18-2667

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,
APPELLEE

v.

EVAN GREEBEL,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (CRIM. NO. 15-637) (THE HONORABLE KIYO A. MATSUMOTO, J.)

BRIEF OF DEFENDANT-APPELLANT AND SPECIAL APPENDIX

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The district court entered final judgment on August 24, 2018. A-3501-3507. Appellant filed a timely notice of appeal on August 29, 2018. A-3512-3513. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by mischaracterizing the duty to disclose applicable to lawyers representing corporations in its jury instruction on conspiracy to commit wire fraud.

2. Whether the district court erred by including in its jury instruction on conspiracy to commit securities fraud through market manipulation overbroad language from this Court's decision in *ATSI Communications, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87 (2007), especially when that decision contains additional language that materially narrowed the conduct that could support conviction.

3. Whether the district court abused its discretion by excluding expert testimony regarding widespread industry conduct identical to conduct that allegedly constituted fraudulent manipulation of the securities market.

STATEMENT OF THE CASE

In this case, the government prosecuted appellant Evan Greebel, a corporate partner in a prominent law firm, for conspiracies to commit wire fraud

and securities fraud based on Mr. Greebel's work as an outside corporate attorney for Retrophin, a small biotechnology startup. Retrophin's chief executive officer was Martin Shkreli, who later became notorious as the "Most Hated Man in America" for raising the price of an AIDS-related drug as CEO of a different company. *See*, *e.g.*, Catherine Ho, *Working for 'The Most Hated Man in America'*, PowerPost, Washingtonpost.com (Oct. 7, 2015) <tinyurl.com/shkreliarticle>. Shortly after Shkreli's explosion into the public eye, the government arrested him and Mr. Greebel. The government pursued eight charges against Shkreli, the last two of which were conspiracy charges for wire fraud and securities fraud in which the government also charged Mr. Greebel.

In prosecuting Mr. Greebel, the government pursued ambitious and aggressive theories based on thin and equivocal evidence. Indeed, Shkreli was acquitted of one of the charges—the conspiracy to commit wire fraud (Count 7)—on which Mr. Greebel was convicted. As a result of the district court's erroneous instructions on key elements of the law, Mr. Greebel has now suffered the loss of his freedom, his reputation, and his livelihood as an attorney.

If Mr. Greebel's convictions are permitted to stand, moreover, the instructions in this case will work substantial injustice in future cases involving attorneys and regular participants in the securities market. That is because the instructions on each count permitted the jury to convict Mr. Greebel for

conduct which, properly considered, was routine and not illegal. Mr. Greebel's convictions were profoundly flawed, and this Court should vacate them.

A. Background

Evan Greebel was a non-equity partner in the New York office of the law firm Katten Muchin Rosenman LLP; his practice focused on mergers, acquisitions, and corporate finance. He had a "good reputation" within the firm; a senior partner described him as "[e]xtremely smart, hard working, very knowledgeable about the law, ethical, [and] honest." A-195 (Tr. 1238-1239); A-2241 (Tr. 8158); *see* A-2430 (Tr. 8588).

In 2011, one of Mr. Greebel's colleagues asked him to consult on a potential representation for a new client, MSMB Capital Management LLC, which was interested in acquiring a biotech company called SeraCare Life Sciences. Several Katten attorneys, including Mr. Greebel, met with two company representatives: Kevin Mulleady, then the CEO, and Martin Shkreli, the managing partner. A-183-184 (Tr. 1190-1192).

At the time, Martin Shkreli was in his late twenties and had been running a hedge fund; he was not yet the notorious public figure he would be by the time of trial. Shkreli was regarded by investors as "brilliant" and a "genius": he was "trustworthy" enough to persuade sophisticated individuals to make substantial investments in his funds. A-278-280 (Tr. 1573-1574); A-568 (Tr. 2725); A-630 (Tr. 2972-2973); A-675 (Tr. 3149); A-1574 (Tr. 6666-6667).

Stephen Aselage, an experienced bioscience executive, testified that his "biggest takeaways" upon meeting Shkreli were that he was "really young" and "really bright"—in fact, "incredibly" so. A-954 (Tr. 4282-4283). Shkreli was "one of the brightest intellects [Aselage] had ever seen," with "incredibly insightful ideas about drug development" and the potential to make a company "very successful." A-966 (Tr. 4329-4330). In 2012, Forbes named Shkreli one of its "30 Under 30" in the pharmaceutical and health-care sectors, under the headline "Hedge Fund Gadfly Turns Biotech Entrepreneur." A-4634-4636.

Shkreli managed a web of interconnected investment entities under the "MSMB" umbrella—a combination of his initials, "MS," and the initials of the co-founder, Marek Biestek, "MB." A-309 (Tr. 1688). According to the government's allegations, those entities included MSMB Capital Management, LLC; MSMB Capital Management LP; MSMB Investors LLC; MSMB Healthcare LP; MSMB Healthcare Investors LLC; and MSMB Healthcare Management LLC. A-79-80. Those entities were "all [Shkreli]'s entities," and he "controlled all of them." A-1371 (Tr. 5856-5857).

Katten accepted MSMB Capital Management LLC as a client. Although the attempted takeover of SeraCare was ultimately unsuccessful, Katten represented MSMB in a few other attempted takeovers in 2011. A-189-190 (Tr. 1212-1213, 1216); A-207 (Tr. 1283-1285); A-3514. Eventually, in 2012,

Shkreli asked Mr. Greebel to represent another of his ventures: Retrophin, LLC, for which Shkreli was the chairman and CEO. A-6540-6546.

Retrophin was an emerging biotech company focusing on rare and life-threatening diseases called "orphan diseases"—conditions suffered by only a relatively small number of patients. A-316 (Tr. 1718-1719); A-5123. The company was founded to explore pharmaceuticals and treatments that could be effective on those conditions, which (because of the small number of patients) ordinarily received little attention from the pharmaceutical and biotechnology industries.

Retrophin's assets were substantially commingled with those of the MSMB entities. Aselage, who briefly served as Retrophin's CEO in the fall of 2012, opined that there was "significant co-mingling of monies" between MSMB and Retrophin—in fact, so pervasive that Shkreli was "likely to be the only person that can untangle them." A-964 (Tr. 4320); A-6108-6124. MSMB and Retrophin operated out of the same offices, and they shared employees and expenses. A-406 (Tr. 2077-2078); A-906 (Tr. 4089); A-1043 (Tr. 4638-4639); A-1212 (Tr. 5220); A-1469 (Tr. 6249); A-6070-6072. Even Retrophin's bank statements were mailed to the company's shared offices "[care of] MSMB." A-906 (Tr. 4088); A-5474-5521.

Retrophin engaged Katten to advise on "a proposed merger with a public company, an equity financing[,] and related corporate and securities law

matters." A-6540-6546. In the engagement letter, Katten's client is listed as Retrophin LLC, *id.*, and Retrophin was required to "designate one or more persons to give [Katten] instructions and authority to receive [Katten's] requests and inquiries." A-6542. Shkreli, in the capacity of the chairman and CEO of Retrophin, signed on the company's behalf. A-6541. Mr. Greebel was the primary partner on the engagement, though a number of other Katten attorneys also worked on Retrophin matters. A-7687-7697.

Katten represented Retrophin from 2012 to 2014. A-391 (Tr. 2017-2018); A-6540-6546. As an outside counsel, Katten had limited access to information about Retrophin and the MSMB entities, and it relied primarily on information provided by Shkreli, its designated contact with Retrophin. A-6540-6546; *see also* A-212 (Tr. 1304).

B. The Charged Conduct

On December 14, 2015, a grand jury in the Eastern District of New York returned an indictment against Shkreli and Mr. Greebel; on June 3, 2016, a grand jury returned a superseding indictment. A-49-78; A-79-114. The majority of counts of the indictment were against Shkreli alone; he was charged with six counts of wire fraud, securities fraud, and conspiracy to commit the same in connection with misrepresentations he made to several investors in certain MSMB entities.

As is relevant here, two counts of the indictment were against Mr. Greebel as well as Shkreli. Count 7 of the indictment charged both men with conspiracy to commit wire fraud under 18 U.S.C. § 1343. A-107-108. In that count, the government alleged that Shkreli and Mr. Greebel had conspired to defraud Retrophin by causing the company to enter into settlement and consulting agreements with disgruntled MSMB investors. A-89, A-93-97. The government alleged that those agreements were for liabilities properly owed not by Retrophin, but by Shkreli or the MSMB entities; and it further alleged that Shkreli and Mr. Greebel had concealed the agreements from the Retrophin board of directors. *Id.*

Count 8—which was added in the superseding indictment—charged Shkreli and Mr. Greebel with conspiracy to commit securities fraud under 15 U.S.C. § 78j(b) and § 78ff. A-108-109. In that count, the government alleged that both men conspired to manipulate the market for Retrophin securities by allocating shares to friendly investors who agreed to hold, rather than trade, the stock. A-109-110. The government also alleged that Shkreli maintained beneficial control over those shares, which he and Mr. Greebel failed to disclose in certain filings with the Securities and Exchange Commission (SEC), and that Shkreli and Mr. Greebel arranged for those shares to be transferred as part of the settlement agreements alleged in Count 7. A-110-111.

Both Shkreli and Mr. Greebel moved to sever their trials, and the court granted the motions. A-115-137. Shkreli was tried first. After a little over four days of deliberation, the jury convicted Shkreli on just three of the eight counts: two counts of securities fraud and Count 8. A-149-151. The jury acquitted him on the remaining counts, including Count 7. *Id.* Shkreli was sentenced to 84 months of imprisonment. A-3163-3169.

C. Mr. Greebel's Trial

Mr. Greebel's trial began on October 20, 2017, and lasted for eleven weeks. What follows is a brief summary of the evidence introduced at trial and the relevant instructions and rulings.

1. Count 7 (Conspiracy To Commit Wire Fraud)[1]

As discussed above, Count 7 stemmed from the settlement of certain litigation threats by disgruntled MSMB investors. The gravamen of the government's theory was that the settlements defrauded Retrophin because, properly considered, the liabilities at issue should have been borne by the MSMB entities or Shkreli, not by Retrophin, and the Retrophin board of directors had not expressly approved the agreements. *See, e.g.*, A-2856-2861 (Tr. 10250-10269) (government closing).[2]

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[1] At trial, the parties referred to Count 7 and Count 8 as "Count 1" and "Count 2," respectively, since those were the only two counts against Mr. Greebel.

[2] Initially, the government theorized that Shkreli and Mr. Greebel also defrauded Retrophin when Shkreli persuaded certain Retrophin investors to

a. Relevant Facts

The first litigation threat that Mr. Greebel received came from Lindsay Rosenwald, a sophisticated investor in MSMB Capital Management LP ("MSMB Capital") who, by his own testimony, "threatened to sue Mr. Shkreli, MSMB, Retrophin, all of them." A-762 (Tr. 3495). In a letter addressed to Shkreli at both his Retrophin and MSMB Capital offices, Rosenwald's attorney asserted potential claims against Shkreli, MSMB Capital, and Retrophin based on the allegedly wrongful liquidation of Rosenwald's investment with MSMB Capital into shares of Retrophin. A-5748-5751. Rosenwald's attorney sought additional shares of Retrophin to settle the matter, and assumed that Retrophin, MSMB Capital, and Shkreli would be jointly represented. *Id.* The letter further threatened that, unless the dispute was resolved, Rosenwald would "fil[e] a civil lawsuit against [Shkreli], MSMB Capital and Retrophin." A-5750.

Mr. Greebel negotiated a settlement agreement with Rosenwald that mirrored the litigation threat he had raised. A-3878-3887. That is, the agree-

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transfer their ownership interests to him, then transferred those units in Retrophin to MSMB Capital while "backdating" the transaction to make it appear as though the transfer occurred several months earlier. A-60-64. By the end of Mr. Greebel's trial, however, the government abandoned the idea that any backdating was an independent fraud, A-2692 (Tr. 9599-9600), and the court instructed the jury that it could not convict Mr. Greebel on the backdating alone, SPA-60.

ment provided a broad and general release for Retrophin as well as its directors, officers, and employees (as well as Shkreli and MSMB Capital). A-5566-5572. This concept was repeated in agreements resolving other threats from MSMB investors: Retrophin received a release from liability for itself, its board members, its officers, Shkreli, and certain MSMB entities. *Compare* A-5567-5568 (Rosenwald agreement), *with, e.g.*, A-5575-5576 (Hassan agreement), *and* A-5584-5585 (Spielberg agreement). In many instances, Retrophin also provided the consideration for the agreements, including stock in the company. *See, e.g.*, A-5574. Two MSMB investors, Alan Geller and Darren Blanton, also agreed to provide consulting services to Retrophin and grant general releases to Retrophin, Shkreli, and certain MSMB entities in exchange for Retrophin stock. A-5634-5642; A-5643-5650; A-5651-5656.

Critical to the government's theory was its contention that Mr. Greebel had failed to disclose the agreements to the board of directors. The evidence on that point, however, was disputed: the defense identified board minutes granting Shkreli the authority to enter into any agreement that did not require payment of a material amount of cash or equity or disclosure to the SEC. A-4500-4502. The government countered that two board members did not recall granting that authority or approving the minutes. A-352 (Tr. 1861-1863); A-985 (Tr. 4405).

There was also substantial evidence that Mr. Greebel had no intent to hide the agreements from Retrophin's board. Within days of Marc Panoff joining Retrophin as chief financial officer in May 2013, Mr. Greebel informed him in writing about the settlement agreements. A-4645-4646. Panoff brought them to the board's attention in July 2013 in a one-page statement of cash flows that included "MSMB Settlements" as a line item. A-3731. Further information about the agreements was provided to the board in September 2013 through draft securities disclosures and financial information. A-6740-6850 (board meeting materials containing draft filings that described the settlement agreements); *see* A-4578-4581. Those disclosures were made without any dissent, hesitation, or restriction from Mr. Greebel. In fact, Mr. Greebel himself added certain consulting agreements to the September 2013 board meeting agenda for discussion, A-5205-5206, and copies of certain of the agreements were provided to the board. A-369 (Tr. 1928-1929); A-490 (Tr. 2413-2414) (board member's testimony acknowledging receipt of two consulting agreements); *see* A-4578-4581.

b. Jury Instruction

For the charge of conspiracy to commit wire fraud, the government advanced the theory that the element of fraudulent misrepresentation could be satisfied by omissions by one with a duty to disclose. Toward that end, the government proposed an instruction, based on the Restatement of the Law of

Agency, that described the duty of any generic fiduciary. A-1683-1684; A-2598 (Tr. 9228). After the district court proposed a substantially similar instruction, A-2397-2398, the defense objected that the proposed instruction both overstated Mr. Greebel's duty as an attorney and would confuse the jury as to whether Mr. Greebel's client was the company or the board. A-2491-2495; A-2596 (Tr. 9219-9220). The court nevertheless adopted a duty-to-disclose instruction that was closely similar to the government's proposal. *Compare* SPA-54-55 *with* A-1683-1684. The court instructed the jury that "[a] duty to disclose material facts" may arise in "the context of a fiduciary relationship, such as the attorney client relationship." SPA-54. In such a context, the court broadly instructed, "a fiduciary owes a duty to disclose all material facts known to him or her concerning the transaction entrusted to it." SPA-54-55.

In its closing argument, the government heavily emphasized Mr. Greebel's "duty to Retrophin because he was the company's lawyer" and his "responsibility to provide them with certain information." A-2849 (Tr. 10221-10222). The government argued, consistent with the court's broad jury instruction, that Mr. Greebel was obligated to disclose to the Retrophin board "all material facts known to [him] concerning the transaction entrusted to him." A-2982 (Tr. 10753-10754).

2. Count 8 (Conspiracy To Commit Securities Fraud)

As discussed above, Count 8 alleged that Shkreli and Mr. Greebel conspired to manipulate the market for Retrophin securities. That count focused on Shkreli's decision to take Retrophin public by executing a "reverse merger," a common transaction whereby Retrophin would acquire a public company in order to become publicly listed without the expense and lead-time of a full initial public offering. A-331 (Tr. 1776-1777). In order to perform the reverse merger, Retrophin needed to find a public "shell" it could purchase. Eventually, Retrophin settled on a defunct company called Desert Gateway. *Id.*

Desert Gateway had previously issued a note that, at the holder's option, could be converted into 2.5 million shares of stock in the company. A-3901-3903 (court order converting note). The note was owned by Troy Fearnow, the son of Desert Gateway's owner, Michael Fearnow. *Id.* Shortly before the reverse merger, Troy Fearnow exercised his conversion rights under the note and allowed Shkreli to choose who could purchase the resulting shares for $0.001 per share. *Id.*; A-7194-7216 (purchase agreements). The transactions allowed Fearnow to recoup part of the note's value, and he elected to keep 100,000 of the shares as an ongoing investment in Retrophin. A-1080 (Tr. 4784). He entered into private purchase agreements with seven individuals identified by Shkreli for the remainder. A-1079-1080 (Tr. 4781-84); A-7194-

7216. These shares were frequently referred to at trial as the "Fearnow shares." The Fearnow shares were "free-trading": that is, they could be bought and sold without restriction. A-1078 (Tr. 4774).

The seven recipients of the "Fearnow shares" were largely either investors in or former employees of the MSMB entities or Retrophin. Some had been at MSMB Capital Management LLC, such as Kevin Mulleady (the former CEO) and Marek Biestek (a co-founder and managing director). A-183 (Tr. 1188); A-186 (Tr. 1202); A-310 (Tr. 1692). Another, Edmund Sullivan, was an associate of Shkreli's and a former Retrophin board member. A-329 (Tr. 1770); A-332 (Tr. 1780-1781). Timothy Pierotti was the former hedge-fund manager for MSMB Consumer and may have also been an employee at Retrophin. A-1371 (Tr. 5855); A-6184-6189. Because Retrophin was unable to raise the funds needed to purchase Desert Gateway all at once, Troy Fearnow distributed 2 million of the shares and held back the remaining 400,000 pending final payment, an arrangement approved by the share recipients. A-1392-1393 (Tr. 5942-5943) (Pierotti).

The government argued at length that the mere *distribution* of the Fearnow shares to aligned investors, and those investors' *holding* of the shares (rather than selling them into the market), constituted market manipulation and thus securities fraud. In closing, for example, the government de-

scribed Count 8 as covering "the distribution of the free-trading . . . Fearnow shares, to a group of associates and Mr. Shkreli with the intention of controlling those shares . . . and then the ways in which [Mr. Greebel] and Mr. Shkreli sought to . . . control the price and volume of Retrophin stock." A-2875 (Tr. 10326-10327).[3]

a. Distribution Of The Fearnow Shares

Central to the government's theory was the idea that the distribution of Fearnow shares to aligned investors was itself wrongful conduct. Indeed, the government emphasized that point in its opening statement, telling the jury that Mr. Greebel helped "illegally control" Retrophin shares when he "helped arrange for the free-trading shares to go . . . to a group of Shkreli's friends." A-156 (Tr. 1082). And it returned to the theme in closing, arguing that "[t]his was a scheme to control the price of stock" because "they put the shares in friendly hands." A-2995 (Tr. 10805).[4]

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[3] The government also argued that Count 8 covered an SEC filing that "failed to disclose Mr. Shkreli's beneficial ownership of those shares." A-2875 (Tr. 10326-10327). As explained below, that was a traditional false-statement theory of securities fraud which, given the evidentiary weakness of the government's case, is unlikely to have persuaded the jury. *See* pp. 49-51, *infra*.

[4] Further confusing the issue, the government incorrectly asserted that the Fearnow shares should have been owned by Retrophin, even though the convertible note was owned by Troy Fearnow, who was not involved in the transaction. Even after the reverse merger, the convertible note and resulting shares remained the property of Fearnow, and he was entitled to sell or retain them at his leisure. Despite arguing at a sidebar that the allocation of the Fearnow shares was "not a securities fraud against Retrophin" but rather "a

How did the government seek to link Mr. Greebel to the alleged conspiracy? It focused on his quotidian legal work, describing him as "papering th[e] entire transaction." A-2877 (Tr. 10335). Mr. Greebel received from Shkreli the list of recipients and the amount of shares each would be purchasing. A-7171-7173. He drafted purchase agreements between Troy Fearnow and each recipient. *See, e.g.*, A-7174-7187. Pursuant to a request from Fearnow's attorney, he asked each recipient to certify that they were not affiliates of Desert Gateway. A-7219-7220. And he facilitated the distribution of share certificates between the transfer agent and the recipients. A-7194-7216.

b. Holding Shares

Another component of the alleged conspiracy was that the recipients of the Fearnow shares generally held their stock, rather than selling it. As the government argued in rebuttal: "[I]f you want [stock] price to stay stable[,] . . . you either hold or buy; they held. . . . That's how you control the price." A-2998 (Tr. 10817-10818).

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securities fraud in general, I guess, [against] the market," A-2235 (Tr. 8136), the government argued to the jury in closing that "the shares should be Retrophin's because Retrophin is paying for the shell," A-2874 (Tr. 10332); *see also* A-2995 (Tr. 10804). The district court was seemingly left with the same misimpression and repeated it at sentencing. A-3481, A-3494 (Sentencing Tr. 55-56, 105).

This argument was built on expert testimony from Deb Oremland, an attorney in the criminal prosecution assistance group at the Financial Industry Regulatory Authority. A-1321 (Tr. 5657-5658). Ms. Oremland testified that, "[u]nder normal market conditions," the price of a stock "operates under the principle of supply and demand," and the effect of having fewer shares available for sale in the market was that "there's more of a chance that the price will remain stable." A-1347 (Tr. 5759-5760). She therefore opined that "it is beneficial for a controlling shareholder to limit the amount of shares available for sale," because "then you have less likelihood that the share price can decline." A-1347 (Tr. 5760).[5]

The government called two witnesses who testified about conversations they had with Shkreli, outside Mr. Greebel's presence, about trading Fearnow shares. A-1078-1079 (Tr. 4776-4778); A-1392-1393 (Tr. 5940-5945). Neither witness informed Mr. Greebel of those conversations. A-1169 (Tr. 5140); A-1203 (Tr. 5186-5187); A-1478 (Tr. 6283-6284).

One witness, Jackson Su, asked Shkreli for Fearnow shares, but never received any. He claimed that Shkreli told him that he had a scheme to control

[5] The defense's expert, Professor Craig Lewis, also testified that, if investors wanted to prevent the price of a stock from dropping, he would expect them to buy or hold shares; if investors wanted to stabilize the price, he would expect them "not [to] transact at all." A-2324 (Tr. 8490). But he opined that the trading data were inconsistent with a coordinated attempt to affect the price of the shares. A-2335 (Tr. 8532).

the Fearnow shares. A-1078-1079 (Tr. 4777-4778). But Su admitted that he never informed Mr. Greebel about that conversation. A-1169 (Tr. 5140).

The other, Timothy Pierotti, was the only recipient of the Fearnow shares to testify at trial. In one conversation, Shkreli told Pierotti and Biestek that he needed to distribute shares to people who were "close to him." A-1392 (Tr. 5941). In another, Pierotti testified that Shkreli expressed a desire to generate volume by having some of the shares traded. A-1393 (Tr. 5944-5945). He further testified, however, that Shkreli was "speaking out of both sides of his mouth," and that he and Biestek were "comfortable" that everything they were doing was "within the law." A-1393 (Tr. 5945-5946). Critically, Pierotti testified that Mr. Greebel was not present at either conversation and, even when he had doubts about Shkreli's conduct, he never expressed his concerns to Mr. Greebel and had no reason to believe that Mr. Greebel was aware of Shkreli's statements. A-1392-1393 (Tr. 5940-5945); A-1480-1481 (Tr. 6293-6295).

Whatever the substance of those conversations, documentary evidence indicated Mr. Greebel believed that the Fearnow recipients were generally free to sell their shares however they wished. When Biestek emailed Mr. Greebel privately to ask whether the Fearnow recipients could sell their shares, Mr. Greebel responded unequivocally that "[y]ou can sell the stock

however and to whomever you want," except to affiliates of the company. A-4946-4947.

c. Trading Activity After The Reverse Merger

After Retrophin went public, some of the Fearnow recipients began trading their shares, and others did not. A-9236. A majority of the trading activity came from Pierotti, who began selling the shares as soon as he could, although he "tried to sell them kind of slowly and carefully and over a period of time" because he "didn't want to sell them aggressively and injure the share price." A-1400-1401 (Tr. 5974-5975); *see* A-1482 (Tr. 6300-6301); A-1488 (Tr. 6324-6325).

In addition to its theory that Shkreli and Mr. Greebel committed securities fraud by distributing the Fearnow shares to friendly investors, the government argued that Shkreli and Mr. Greebel subsequently attempted to stop Pierotti from trading his shares. Indeed, the government argued that this was the "clearest example" of their attempt to "control the price [and] trading volume of the Retrophin stock." A-2879 (Tr. 10343).

To this end, the jury heard considerable evidence regarding the effect of supply, demand, and trading volume on the securities market. In particular, the government argued that Pierotti's sale of Retrophin shares drove the market price down, and introduced evidence to that effect. A-1346 (Tr. 5755). Several witnesses testified that market activity—including ordinary trading—

could affect stock price, particularly for relatively thinly traded stocks such as Retrophin's. *See, e.g.*, A-567 (Tr. 2719); A-798 (Tr. 3637).

In addition, the government presented evidence of various steps Shkreli took to persuade and then prevent Pierotti from trading, including attempting to contact him; attempting to bring him "over the wall" by exposing him to material non-public information; and threatening to sue Pierotti in connection with an agreement that Shkreli alleged they had made for Pierotti to perform work for Retrophin in exchange for the opportunity to purchase the Fearnow shares. The government argued at closing that those steps were sufficient to constitute market manipulation. *See, e.g.*, A-2995 (Tr. 10805-10807).

d. Proposed Expert Testimony

In response to the government's argument concerning market manipulation involving the Fearnow shares, the defense notified the government of a proposed supplemental opinion by its expert witness Stephen Ferruolo, dean of the University of San Diego School of Law and a former partner at Goodwin Procter LLP. A-2034. Dean Ferruolo would have testified that "one of a company's goals" in going public is to "create an orderly and stable market." *Id.* He would also have testified that companies could "reasonably allocate [freely trading] shares to individuals who are friendly to the company and share the same goal of creating an orderly and stable market." *Id.*

The government opposed the supplemental opinion, arguing that it was irrelevant and that it was an opinion on a legal issue. A-2112-2113 (Tr. 7645, 7648). After further discussion and supplemental briefing, *see* A-2112-2113 (Tr. 7647-7650); A-2190-2192 (Tr. 7956-7965), the district court excluded the proposed opinion, ruling both that it was factually inapposite and would constitute "an ultimate conclusion on the law . . . regarding whether or not something is permitted and lawful." A-2279 (Tr. 8308-8309).

e. Jury Instruction On Market Manipulation

Although the district court instructed the jury on traditional false-statement securities fraud under Rule 10b-5(b), it also instructed the jury on a different theory under Rule 10b-5(a), which involved market manipulation. *See generally ATSI*, 493 F.3d at 101 (noting that "[a] market manipulation claim . . . cannot be based solely upon misrepresentations or omissions"). As to that theory, the jury instructions stated that "[a]n essential element of manipulation of securities is the deception of investors into believing that the prices at which they purchase and sell securities are determined by the natural interplay of supply and demand." SPA-69-70. The defense objected to that instruction, arguing that it would erroneously suggest to the jury that "any desire to control the price of stock is per se improper" and could leave the jury with the mistaken impression that any activity that affected market price (even a decision to hold stock) was illegal manipulation. A-2715-2716 (Tr. 9689,

9690). But the district court concluded that the phrasing was appropriate, reasoning that it hewed closely to language in this Court's decision in *ATSI*, *supra*. A-2716 (Tr. 9690-9691).

D. Verdict and Post-Trial Proceedings

The district court instructed the jury on Friday, December 22, 2017, and the jury began deliberations that day. On December 27, the jury returned a verdict, finding Mr. Greebel guilty on both counts. A-3124. The court sentenced Mr. Greebel to eighteen months of imprisonment. A-3501-3507. Based solely on Count 7, the district court ordered him to pay more than $10.4 million in restitution.[6] A-3505. Mr. Greebel began serving his sentence on October 17, 2018.

This appeal follows.

SUMMARY OF ARGUMENT

The overbroad and unclear instructions given in this case invited the jury to convict Mr. Greebel for conduct that was not a crime. And the flaw in one of those instructions was compounded by the district court's erroneous

[6] Approximately 70% of Mr. Greebel's restitution figure derives from Retrophin restricted stock that the company issued in connection with the settlement and consulting agreements. Over the defense's objection, the district court accepted the government's argument that it should value those shares at the market price for free-trading shares when the stock was distributed. A-3281; A-3481, A-3482 (Sentencing Tr. 55, 57). Now, however, the government acknowledges that restricted shares have "*no inherent value* at the time of distribution." Gov't Br. at 65, *United States* v. *Shkreli*, No. 18-819 (2d Cir. Nov. 30, 2018) (emphasis added).

exclusion of expert testimony that would have revealed to the jury that aspects of market practice described by the government as nefarious were in fact routine and commonplace. This Court should vacate Mr. Greebel's convictions.

I. On Count 7, the district court correctly instructed the jury that wire fraud could be committed through omissions by one with a duty to disclose. But it proceeded to misstate the duty of disclosure that a lawyer owes to a client, and it further failed to instruct the jury that Mr. Greebel's client was Retrophin, not its board of directors, and that lawyers inform corporate clients through designated representatives of the corporation. To be sure, there are circumstances under which a lawyer may have to report on the misconduct of a designated representative. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 96 (2000); N.Y. Rules of Prof'l Conduct, R. 1.13(b). But despite the defense's bringing that authority to the district court's attention, the court did not instruct on that duty either.

As a result, the jury could very well have convicted because it thought, based on the government's arguments at closing, that Mr. Greebel had not disclosed the settlement and consulting agreements to Retrophin's board of directors. Indeed, the instruction had the effect of nullifying the core of Mr. Greebel's defense on Count 7: namely, that the agreements (and the obligations they placed on Retrophin) were legitimate responses to litigation risks

posed to Retrophin by investors, at least one of whom had expressly threatened to sue Retrophin in addition to Shkreli and the MSMB entities. Under the Court's improper instruction requiring disclosure of "all material facts . . . concerning the transaction," SPA-50, the jury did not need to consider whether the agreements were in Retrophin's interest—let alone whether Mr. Greebel believed that they were.

II. On Count 8, the jury received an incorrect instruction as to what constitutes securities fraud, the substantive crime that Mr. Greebel was accused of conspiring to commit. In particular, the jury received an instruction on what constitutes a "device, scheme, or artifice to defraud" regarding market manipulation. But the instruction contained general language borrowed from this Court's precedents that the Court has acknowledged requires further clarification. In particular, the district court instructed the jury that "[a]n essential element of manipulation of securities is the deception of investors into believing that the prices at which they purchase and sell securities are determined by the natural interplay of supply and demand." SPA-69-70. The district court borrowed that language from this Court's decision in *ATSI*, 493 F.3d 87. There, however, the Court made clear that courts should "ask" more before determining that conduct is manipulative, such as whether the "alleged manipulator [has] engaged in market activity" and whether the conduct "sends a false pricing signal to the market." *Id.* at 100.

In closing, the government exploited the overbroad instruction to the hilt. The government argued a host of conduct to the jury that does not rise to the level of market manipulation, asking it to convict because Mr. Greebel assisted Shkreli with arranging for the Fearnow shares to be bought by individuals friendly to Retrophin, and because those individuals then held the shares. It even suggested that Mr. Greebel engaged in a conspiracy to manipulate the market by advising on Shkreli's efforts to stop Pierotti from trading. It is therefore not just possible, but overwhelmingly likely, that the jury convicted based on the overbroad instruction it was given.

III. Even if the Court were to conclude that the jury was correctly instructed as to the key concept of market manipulation, Mr. Greebel's conviction on Count 8 would have to be vacated, because the district court erred in excluding expert testimony that would have provided the jury with important context for the very conduct that the government alleged was manipulative. The court's exclusion of Stephen Ferruolo's testimony precluded the defense from showing that distributing shares to friendly investors is a common market practice. That testimony would have been vital to lay jurors asked to evaluate the conduct of sophisticated participants in the capital markets and to determine Mr. Greebel's state of mind—the core element of his trial defense.

In sum, Mr. Greebel's convictions are legally dubious, secured only with the benefit of vastly overinclusive jury instructions and the improper exclusion

of important expert testimony. The convictions should be vacated and the case remanded for a new trial.

STANDARD OF REVIEW

The Court reviews jury instructions de novo. *See*, *e.g.*, *United States* v. *Prado*, 815 F.3d 93, 100 (2d Cir. 2016). An error occurs when an instruction either does not "adequately inform the jury of the law" or "misleads the jury as to the correct legal standard." *Id.* (citation omitted). And "an erroneous jury instruction [is] harmless only if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States* v. *Silver*, 864 F.3d 102, 119 (2d Cir. 2017) (internal quotation marks and citation omitted), *cert. denied*, 138 S. Ct. 738 (2018). Moreover, "[w]here a jury is presented with multiple theories of conviction, one of which is invalid, the jury's verdict must be overturned if it is impossible to tell which theory formed the basis for conviction." *United States* v. *Sheehan*, 838 F.3d 109, 121 (2d Cir. 2016) (quoting *United States* v. *Szur*, 289 F.3d 200, 208 (2d Cir. 2002)).

This Court reviews the exclusion of expert testimony for abuse of discretion. *See*, *e.g.*, *United States* v. *Litvak*, 808 F.3d 160, 179 (2d Cir. 2015). A district court abuses its discretion by excluding an expert opinion that "could have educated the jury" on "highly[] specialized" points of securities practice that go to a "central issue in the case." *Id.* at 183. And an error is not harmless

if the reviewing court cannot "conclude with fair assurance that the errors did not substantially influence the jury." *Id.* at 184 (citation omitted).

ARGUMENT

I. THE DISTRICT COURT'S WIRE-FRAUD INSTRUCTION WAS ERRONEOUS

In instructing the jury regarding Count 7, conspiracy to commit wire fraud, the district court gave an erroneous instruction regarding the substantive crime of wire fraud itself. Specifically, the district court imposed a duty to disclose on Mr. Greebel that bore no resemblance to the applicable duty for lawyers representing organizational clients. That erroneous instruction, aggravated by the government's arguments in closing, invited the jury to convict Mr. Greebel for violating a duty he did not have. The district court's error requires vacatur of Mr. Greebel's conviction on Count 7.

The district court included the erroneous instruction at the government's request and over the defense's objection. At trial, the government proposed a wire-fraud instruction that described a generic duty to disclose applicable to agents or fiduciaries, which was principally based on the Restatement of the Law of Agency. A-1683-1684; A-2598 (Tr. 9228). After the court proposed a similar instruction, A-2397-2398, the defense challenged the generic duty-to-disclose instruction as inapplicable to lawyers and, in the specific con-

text of this case, likely to cause the jury to believe that Mr. Greebel had a general duty to disclose information to Retrophin's board of directors. A-2491-2495.

The district court nevertheless gave the proposed instruction. As to the first element of wire fraud—a scheme or artifice to defraud—the court instructed the jury that "omission of material facts, when under a duty to disclose these material facts, may . . . constitute false or fraudulent representations." SPA-54. The court further instructed the jury that "[a] duty to disclose material facts may . . . arise in the context of a fiduciary relationship, such as the attorney-client relationship." *Id.* Of particular relevance here, the court stated that "a fiduciary owes a duty to disclose all material facts known to him or her concerning the transaction entrusted to it." *Id.* The court justified the last part of the instruction by relying on cases involving fiduciaries—but not lawyers—and explaining that the attorney-client relationship is the highest form of fiduciary relationship. *See* A-2598-2600 (Tr. 9226-9236). As we will now explain, that instruction was profoundly flawed.

A. The Wire-Fraud Instruction Imposed An Inapplicable Duty to Disclose

As this Court has consistently held, "[a] jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Prado*, 815 F.3d at 100 (internal quotation marks

and citation omitted). Under that standard, the district court's duty-to-disclose instruction was plainly erroneous: it misstated the relevant law and did not adequately inform the jury on the law relevant to the case before it.

The district court adopted language proposed by the government that was based on the Restatement of the Law of Agency and addressed the duties of fiduciaries more generally. A-1683-1684; A-2596-2602 (Tr. 9219-9241). But the relationship of lawyer to client is "unique," *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994), and the duties arising from that relationship are set out in a separate Restatement—the Third Restatement of the Law Governing Lawyers.

Under that Restatement, lawyers have no general duty to disclose "all material facts" to a client, and the instruction requiring as much was therefore erroneous. The Restatement makes clear that a lawyer's duty of disclosure requires only that a lawyer "keep a client *reasonably informed* about the matter." Restatement (Third) of the Law Governing Lawyers § 20(1) (emphasis added); *see* N.Y. Rules of Prof'l Conduct, R. 1.4(c).[7] That more limited duty reflects the reality that "the lawyer typically has knowledge and skill that the

[7] To be clear, the New York Rules of Professional Conduct "are not designed to be a basis for civil liability" and a violation of one does not "create any presumption . . . that a legal duty has been breached." N.Y. Rules of Prof'l Conduct, Preamble ¶ 12. That being said, the duties set forth in the Restatement and the standards set forth by the ethical rules are essentially identical, and lawyers' ethical duties inform the liability standards under which their conduct is evaluated.

client lacks and often makes or implements decisions in the client's absence." Restatement (Third) of the Law Governing Lawyers § 20 cmt. b.

More fundamentally, the instruction erroneously invited the jury to confuse Retrophin's board of directors (which was not Mr. Greebel's client) with Retrophin itself (which was). The defense specifically objected to the instruction on that basis, reminding the district court that "[i]t is well-settled that outside counsel to a corporation represents the corporation, not its shareholders or other constituents." A-2494 (quoting *Murray* v. *Metropolitan Life Insurance Co.*, 583 F.3d 173, 177 (2d Cir. 2009)). That is black-letter law: when a lawyer represents an organization, "the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures." Restatement (Third) of the Law Governing Lawyers § 96(1)(a). Indeed, "the lawyer must follow instructions . . . given by persons authorized so to act on behalf of the organization." *Id.* § 96(1)(b); *see id.* cmt. d. "When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful." N.Y. Rules of Prof'l Conduct, R. 1.13 cmt. [3].[8]

[8] Those principles were also embodied in Katten's engagement letter with Retrophin, which stated that Katten represented Retrophin and not any of its constituents or its board of directors, and specifically instructed Retrophin to "designate one or more persons to give [the law firm] instructions and authority to receive [the firm's] requests and inquiries." A-6542.

Here, Mr. Greebel was dealing with the highest corporate officer at Retrophin; Shkreli was the company's founder and CEO. There was no notion in the case that Mr. Greebel violated any duty to disclose information to Shkreli. Instead, the government's charge was that Mr. Greebel conspired with Shkreli to harm Retrophin by entering into the settlement and consulting agreements. To be sure, there are circumstances in which a lawyer is obligated to take action because a corporate agent is harming the corporation, and the defense directed the district court to that standard as well. A-2494. Specifically, Section 96(2) of the Restatement provides:

> If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act *in a way that violates a legal obligation to the organization* that *will likely cause substantial injury to it*, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, *the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization*.

Restatement (Third) of the Law Governing Lawyers § 96(2) (emphases added); *accord* N.Y. Rules of Prof'l Conduct, R. 1.13(b).[9] One way in which a lawyer may proceed under subsection (2) is by "referring the matter to the highest authority that can act [on] behalf of the organization," which is usually

[9] The defense also originally requested a jury instruction on Section 307 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245, and its regulations, under which lawyers representing public companies (such as Retrophin) have similar duties to report violations within a company, which are enforceable only by the SEC. A-1812-1814; *see* 17 C.F.R. §§ 205.6-205.7.

the board of directors. Restatement (Third) of the Law Governing Lawyers § 96(3) & cmt. f; *see* N.Y. Rules of Prof'l Conduct, R. 1.13(b).

The standards articulated in the Restatement and ethics rules are necessary for the effective provision of legal services. Neither lawyers nor corporate clients benefit from confusion as to whom a lawyer must inform about a given matter. One cannot imagine that most corporate boards of directors desire to be informed of most legal matters—let alone "all material facts . . . concerning" those matters. SPA-54.

The district court's instruction did not set out those standards. It failed to make clear that Mr. Greebel was not representing the Retrophin board of directors. It failed to convey both that lawyers such as Mr. Greebel usually interact only with specific corporate representatives. And, finally, it failed to convey that lawyers may be required to go beyond communicating with those representatives, and disclose information directly to the board, only if the officer's conduct "violate[d] a legal obligation to the organization" and that violation was "likely [to] cause substantial injury to it." Restatement (Third) of the Law Governing Lawyers § 96(2).

B. The Duty-to-Disclose Instruction Invited The Jury To Convict Mr. Greebel On An Invalid Basis

The district court's failure to give an appropriate wire-fraud instruction was gravely prejudicial. The government bears the burden of establishing that an erroneous instruction was harmless, which requires it to show that "it

is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Silver*, 864 F.3d at 119 (internal quotation marks and citations omitted).

That showing is impossible to make in this case. "[T]he purpose of a proper charge is to give the jury guideposts as to what would qualify as criminal wrongdoing under the law." *Id.* at 118. The instruction in this case failed to guide the jury as to a lawyer's duties and how they are fulfilled by the lawyer's interacting with a representative of a corporate client; it further failed to identify when a lawyer may have a duty to disclose information to a corporate client's board of directors. The government took full advantage of the erroneous instruction. If it had been instructed properly on the relevant duty, it is far more than "possible" that the jury would have acquitted, having determined that there was not proof beyond a reasonable doubt that Mr. Greebel violated the duty as correctly defined. *See id.* at 119.

Conversely, the erroneous duty-to-disclose instruction that the district court gave rendered Mr. Greebel's central defense on the wire-fraud count entirely irrelevant. As the defense stressed in its closing argument, the settlement and consulting agreements were in the company's interest. A-2912-2914 (Tr. 10472-10481). Under the instruction as given, however, the jury had no reason even to consider whether the agreements benefited Retrophin. All the

jury had to consider was "the transaction entrusted to" Mr. Greebel—the disputes with the MSMB investors—and then whether Mr. Greebel failed to disclose "material facts . . . concerning" that transaction to the board. SPA-54. That instruction set an improperly low bar for the government to clear.

1. The instruction created a high risk that the jury convicted Mr. Greebel simply for failing to disclose the settlement and consulting agreements to Retrophin's board, despite the jury never having determined that Mr. Greebel had a duty to inform the board. The government exacerbated that risk by drawing the jury's attention to that purported non-disclosure at every opportunity. The government mentioned the disclosure issue no fewer than ten times in closing arguments alone, repeatedly encouraging the jury to find guilt on this basis. *See* A-2849 (Tr. 10221-10222); A-2860-2862 (Tr. 10268-10274); A-2867 (Tr. 10295); A-2868 (Tr. 10297); A-2870 (Tr. 10305); A-2875 (Tr. 10325); A-2982 (Tr. 10753-10754); A-2983 (Tr. 10758-10759); A-2984 (Tr. 10760); A-2993 (Tr. 10797). For example, as part of its rebuttal, the government parroted the jury instruction, stating as follows: "[T]he attorney owes a duty of disclosure of all material facts known to him or her concerning the transaction entrusted to him. . . . That was the defendant's duty and you know he violated it." A-2982 (Tr. 10753-10754).

The government also repeatedly framed the duty to disclose as running specifically to the board, even though Mr. Greebel represented not the board

but the corporation. *See* A-2860-2862 (Tr. 10268-10274); A-2867 (Tr. 10295); A-2868 (Tr. 10297). With its relentless focus on this issue, the government all but ensured that the erroneous instruction would prejudice the defense. Indeed, the government's theme resonated with the district court, which noted at Mr. Greebel's sentencing that "the trial evidence established that Mr. Greebel never advised the Retrophin board of any litigation threats against Retrophin, *a duty that as outside counsel he was particularly charged with fulfilling*." A-3480 (Sentencing Tr. 51) (emphasis added).

If the instruction had correctly stated the duty to disclose, the jury may well have found Mr. Greebel not guilty. Mr. Greebel had informed the corporate officer with whom he was interacting: Shkreli knew all about the settlements. Indeed, Mr. Greebel informed others at the company as well, including Marc Panoff, Retrophin's chief financial officer, who was advised in writing about the settlement agreements within days of joining Retrophin. A-4645. As to informing Retrophin's board, any potential duty to inform its members would have been triggered only if Mr. Greebel knew that the settlement and consulting agreements violated Shkreli's legal obligations to Retrophin and were likely to cause the company substantial injury. Restatement (Third) of the Law Governing Lawyers § 96(2); N.Y. Rules of Prof'l Conduct, R. 1.13(b).

2. One of the central propositions of Mr. Greebel's defense was that the agreements were in Retrophin's interest. Under the agreements, the investors gave Retrophin and its officers, directors, and employees a general release from all known or unknown claims. A-5566-5572; A-5573-5581; A-5582-5590; A-5591-5599; A-5600-5607; A-5608-5617; A-5622-5627; A-5628-5633; A-5634-5650; A-5651-5656.

A release is valuable when the released party could face a risk of liability, and there was good reason to think that Retrophin did. The investors' basic complaint was that Shkreli had converted their investment in the MSMB entities into shares of Retrophin without the investors' consent and at an inflated price. A-5749; A-5952-5953. As compensation, many wanted more Retrophin shares. A-5750; A-5953; A-5590.

As limited partners in the MSMB entities, the investors could have brought suit against the entities themselves, and against Shkreli. *See, e.g.*, *Drenis* v. *Haligiannis*, 452 F. Supp. 2d 418 (S.D.N.Y. 2006); *Anglo American Security Fund, L.P.* v. *S.R. Global International Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003). Critically, however, the investors could also have brought claims *against Retrophin*, because the assets of the MSMB entities were substantially commingled with Retrophin's assets. *See* p. 5, *supra*. That presented a substantial risk that Retrophin would be liable for claims brought

against the MSMB entities on a theory of reverse veil-piercing, even if Retrophin had not directly caused the losses underlying those claims. *See*, *e.g.*, *American Fuel Corp.* v. *Utah Energy Development Co.*, 122 F.3d 130, 134 (2d Cir. 1997) (noting New York law allows reverse veil-piercing, which "seeks to hold a corporation accountable for actions of its shareholders").[10] It would have been entirely foreseeable that the investors would use all available means to target Retrophin. As a newly capitalized "deep pocket" and the entity whose securities the investors were seeking, Retrophin was the most prominent target for litigation—and thus had particularly compelling reason to settle potential claims against it.

Indeed, in a written threat—the first Mr. Greebel received—Lindsay Rosenwald made the risk to Retrophin explicit. The letter from Rosenwald's

[10] Mr. Greebel referred to Retrophin's exposure to liability for conduct committed by MSMB and Shkreli in a draft document referred to as the "Control Memo." A-7421. The company's auditors insisted on Retrophin's preparing a memorandum that outlined increased internal controls; Mr. Greebel drafted the memo at the behest of Panoff, the company's chief financial officer. A-2930 (Tr. 10544-10545) (defense closing); *see* A-1255 (Tr. 5393-5395), A-1258 (Tr. 5405-5407); A-1269-1270 (Tr. 5451-5453). The memo stated that Retrophin had determined that payments made pursuant to the settlement agreements should have been "borne solely by MSMB and its related funds," reflecting that the investors' claims were caused by MSMB and Shkreli. A-7421. Notwithstanding the fault of MSMB and Shkreli, Retrophin faced litigation risk—as Rosenwald's letter showed, A-5749—and so the memo makes clear that Retrophin received releases "in order to prevent [the MSMB] investors from initiating a claim against [Retrophin]." *Id.*

lawyer referenced potential claims not just against Shkreli and MSMB Capital, but also against Retrophin specifically. A-5749. The stated basis for the claims was "[Shkreli's] unauthorized conversion of Dr. Rosenwald's investment" into Retrophin stock, and Rosenwald, like other investors, sought additional Retrophin shares to settle the matter. A-5749-5750; *see also* A-5952-5953 (Kocher); A-5990 (Alan Geller). As a result, there was evidence that Mr. Greebel both understood the nature of the investors' claims and received an express threat against Retrophin, which were more than enough to put the average lawyer on notice that Retrophin faced a potential risk of liability. The district court acknowledged as much. A-747-748 (Tr. 3436-3437) (discussing Mr. Greebel's perception of litigation threats facing Retrophin and the potential benefit of securing releases); A-2219 (Tr. 8070) (recognizing Mr. Greebel's awareness of commingling between MSMB and Retrophin).

Litigation by MSMB investors posed additional, particular risks to Retrophin. Even if a company expects to succeed on the merits, the strain on company resources and bad press that surround any litigation are reasons to settle cases. *See*, *e.g.*, John R. Allison, *Five Ways to Keep Disputes Out of Court*, Harv. Bus. Rev. (Jan.-Feb. 1990) <tinyurl.com/allison-hbr>. Those risks are especially pronounced for fledgling start-ups like Retrophin that need to attract additional capital. That describes Retrophin. A-956 (Tr. 4288-4289); A-961 (Tr. 4311-4312); A-1016 (Tr. 4528-4530).

The instruction given by the district court invited conviction without considering any of those rationales for the agreements and without regard to Mr. Greebel's duties as a lawyer. The conviction on Count 7 should therefore be vacated.

II. THE DISTRICT COURT'S INSTRUCTION ON MARKET MANIPULATION WAS ERRONEOUS

The district court further erred by improperly instructing the jury on Count 8, which alleged a conspiracy to commit securities fraud. As with the erroneous instruction in Count 7, that error went to the core of the substantive crime Mr. Greebel was charged as being in a conspiracy to commit—here, securities fraud, and particularly what constitutes a "device, scheme, or artifice to defraud." SPA-69-70. The court provided a definition of "manipulative conduct" that misled the jury into believing it could convict Mr. Greebel on the basis of *any* action that affected the market price of a security. That is not the law in this circuit, as the case relied upon by the district court makes clear.

A. The Market-Manipulation Instruction Was Overbroad And Confusing

In relevant part, the district court's instructions on market manipulation informed the jury as follows:

> Manipulative conduct that is designed to deceive or defraud investors by controlling or artificially affecting the price of securities is prohibited. An essential element of manipulation of securities is the deception of investors into believing that the prices at which they purchase and sell securities are determined by the natural interplay of supply and demand.

SPA-69-70. The defense objected to the inclusion of that language on the ground that it would mislead the jury into believing that *any* activity affecting the market price of a security would constitute market manipulation. A-2715-2716 (Tr. 9689-9690). But the court overruled the defense's objection, citing this Court's decision in *ATSI* as the basis for the language in the instruction and noting that manipulation is "virtually a term of art when used in connection with the security markets." A-2716 (Tr. 9690-9691). It therefore included the "interplay of supply and demand" language in order "to h[ew] close to the Second Circuit." A-2716 (Tr. 9691).

The district court's instruction does not "hew close" to this Court's precedents; it violates them by introducing the broad "natural interplay of supply and demand" language found in *ATSI* (and other decisions) while omitting two critical holdings that give meaning and form to that broad language. First, there must be "a showing that an alleged manipulator engaged in market activity." *ATSI*, 493 F.3d at 100; *see Santa Fe Industries* v. *Green*, 430 U.S. 462, 476 (1977) (noting that market manipulation "refers generally to practices such as wash sales, matched orders, or rigged prices"). And second, the market activity must "be willfully combined with something more to create a false impression of how market participants value a security." *ATSI*, 493 F.3d at 101. The latter limitation in particular gives form and meaning to the broad

"natural interplay" language: "In identifying activity that is outside the 'natural interplay of supply and demand,' courts generally ask whether a transaction sends a false pricing signal to the market." *Id.* at 100.

Accordingly, when this Court has used the "natural interplay" language, it simultaneously also applied the concrete limitations that there be "market activity" that sends a "false pricing signal." *ATSI*, 493 F.3d at 100; *accord Wilson* v. *Merrill Lynch & Co., Inc.*, 671 F.3d 120, 130 (2d Cir. 2011); *see also City of Providence* v. *BATS Global Markets, Inc.*, 878 F.3d 36, 49-50 (2d Cir. 2017), *cert. denied*, 139 S. Ct. 341 (2018); *United States* v. *Royer*, 549 F.3d 886, 899-900 (2d Cir. 2008).[11] In the words of the SEC, "[t]he essence of manipulation" is "market activity—the buying and selling of shares—that itself creates a 'false pricing signal.'" SEC Br. at 3, *Fezzani* v. *Bear, Stearns & Co.*, 777 F.3d 566 (2d Cir. 2015) (quoting *ATSI*, 493 F.3d at 100).

Those limitations are essential to limit the otherwise broad and ambiguous "natural interplay" language. On its own, that language provides no guidance to lay jurors, who can subject market participants to criminal sanctions

[11] In *Royer*, this Court did not find error in a jury instruction that contained the "natural interplay" language. *See* 549 F.3d at 899-900. There, however, the defendants argued only that market manipulation requires the dissemination of actual "false statements," which is directly contradicted by numerous precedents of the Supreme Court and this Court, including *ATSI*. *Id.*; *ATSI*, 493 F.3d at 99-101. In any event, the instruction in that case made clear that even "group trading" is not market manipulation; the jury was expressly instructed to that effect. *Royer*, 549 F.3d at 899.

based on their own interpretation of the language. The securities laws "demand[] certainty and predictability" in order to offer "predictive value to those who provide services to participants in the securities business." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (internal quotation marks and citation omitted). For that reason, the Supreme Court has made clear that "[a] shifting and highly fact-oriented disposition of the issue of who may be liable . . . [under] Rule 10b-5" is not acceptable even for civil liability. *Id.* (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975)). That principle applies with all the more force in the context of criminal liability. *See* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) (noting "[t]he culture of prosecutors in these areas of law is to seek rules that are palpably overbroad so that they have a broad arsenal of weapons to use against suspected wrongdoers").

B. The Error In The Market-Manipulation Instruction Was Prejudicial

The jury in this case received only the broad "natural interplay" language without the limiting language found in *ATSI* and other decisions. As the defense argued at the charge conference, the instruction read "as if any desire to control the price of stock is per se improper." A-2715 (Tr. 9689). The instruction told jurors that it is "deception" for the price of a security not to be

"determined by the natural interplay of supply and demand." SPA-70. But it did not give lay jurors any sense of what "the natural interplay of supply and demand" *means*. For that reason, the instruction did not satisfy the "purpose of a proper charge," which is to provide "guideposts as to what would qualify as criminal wrongdoing" and what would not. *Silver*, 864 F.3d at 118. The government cannot meet its burden of showing that the instructional error was harmless.

1. Here, as in *Silver*, "the jury may have convicted [Mr. Greebel] for conduct that is not unlawful, and a properly instructed jury might have reached a different conclusion." 864 F.3d at 119. There are three categories of conduct presented to the jury that the jury could have interpreted as satisfying the erroneous instruction. Indeed, the government invoked each of those categories of conduct in its closing argument. *Cf. id.* at 118 (noting that "[t]he Government's own summation confirms that the jury instructions conveyed an erroneous understanding of the law").

a. The most glaring example of conduct on which the jury could have incorrectly convicted Mr. Greebel was the mere holding of the free-trading shares by the recipients of the Fearnow shares. The jury heard testimony that many recipients held their shares. A-1345 (Tr. 5753); A-1347 (Tr. 5760-5761); A-2342-2343 (Tr. 8562-8563). And in its closing argument, the government specifically argued that the holding of the shares was improper:

> This is a simple price manipulation. This is making sure the stock doesn't fall. . . . *If you want the price to stay stable, . . . , you either hold or buy; they held.* And look what happened to the price of the stock. It remained absolutely the same. It stayed in that volume.

A-2998 (Tr. 10818) (emphasis added).

Given the erroneous instruction, a rational jury could have concluded that simply holding stock interfered with "the natural interplay of supply and demand." SPA-70. But holding stock is not market manipulation; it is an everyday occurrence. Nor is the analysis any different simply because the holding of stock may have been coordinated. As the jury was instructed in *Royer*, "group trading by itself without the intent to deceive and defraud is not market manipulation." 549 F.3d at 899. Consistent with that notion, retail brokerages such as Charles Schwab and Fidelity routinely seek to force customers to hold stock for several weeks after an initial public offering through policies that penalize customers from trading shares that they receive in an offering allocation. *See* Kathleen Pender, *Time Running Out To Get In On Facebook IPO*, S.F. Chron. (May 15, 2012) <tinyurl.com/pender-article>.

The legality of holding stock would have been apparent if the jury had been instructed about the additional limitations discussed above. Holding stock—*i.e.*, not trading—is not "market activity." *ATSI*, 493 F.3d at 100. Nor does holding stock send a "false pricing signal to the market." *Id.* To the extent holding stock sends a signal, it is simply that a shareholder thinks that its profit will be maximized by maintaining its position in a company. That is

the most rudimentary investment strategy that exists—"buy and hold." *See, e.g.*, Kathleen Elkins, *Warren Buffett And Jack Bogle Agree On The Formula For Long-Term Success: 'Buy And Hold'*, CNBC (Sept. 18, 2018) <tinyurl.com/buffett-bogle>. Put simply, holding stock is not fraud, yet the instruction allowed the jury to convict for that (non-)conduct.

b. The second category of legal conduct on which the jury could have incorrectly convicted Mr. Greebel was having facilitated the sale and delivery of the Fearnow shares to individuals who were unlikely to sell them.[12] Again, the government emphasized that theory to the jury in its closing argument: "This was a scheme to control the price of the stock. . . . They needed to make sure the stock price didn't collapse, but they needed to show liquidity. *And to do that, they put the shares in friendly hands*." A-2995 (Tr. 10805) (emphasis added). The district court also described Mr. Greebel's conviction on this count as being "due to his role in the negotiation and structure of the reverse merger with Desert Gateway in which Retrophin purchased, among other things, 2.5 million free-trading shares, [and] *the allocation of the free-*

[12] The risk of the jury having convicted on this basis is compounded by the erroneous exclusion of expert testimony that allocating shares to aligned investors is a common market practice for fledgling companies. *See* pp. 51-56, *infra*.

trading [shares] to [Shkreli's] friends and associates." A-3481 (Sentencing Tr. 55-56) (emphasis added).[13]

As with holding shares, the jury could have concluded that merely distributing shares to "friendly" individuals constituted market manipulation, on the theory that it interfered with the price of Retrophin shares being "determined by the natural interplay of supply and demand." SPA-70. Indeed, the jury could have thought that it was market manipulation simply because the shares were not sold through the open market, but rather to buyers identified by Shkreli. If the jury had been instructed about the additional limitations discussed above, however, it would have realized that distributing shares in that manner does not transmit "a false pricing signal to the market." *ATSI*, 493 F.3d at 100. As the government conceded, private sales, such as the sales by Fearnow himself, do not "affect the price or volume" of shares. A-2997 (Tr. 10814).

c. Lastly, while it is less likely, the jury could have convicted because it concluded that Mr. Greebel participated in Shkreli's attempts to limit the

[13] The district court's description is erroneous because Retrophin never purchased the free-trading shares. *See* p. 15 n. 4, *supra*. The district court went on to note that Mr. Greebel was also convicted of having helped Shkreli with "controlling those shares[] and concealing the control of [the shares]." A-3481 (Sentencing Tr. 55-56). As explained below, there is significant reason to doubt that the jury convicted Mr. Greebel on the theory that he knowingly participated in the control of the shares.

trading of one of the Fearnow shareholders, Timothy Pierotti. The government certainly invited that conclusion, arguing in closing that "the Tim Pierotti story" was "the clearest example of [Mr. Greebel] and Mr. Shkreli seeking to control the price [and] trading volume of the Retrophin stock." A-2879 (Tr. 10343).

Shkreli's efforts to stop Pierotti's trading took various forms. First, Shkreli did what the government characterized as "ask[ing] nicely" for Pierotti to stop, A-2995 (Tr. 10806), when he e-mailed Pierotti in an attempt to talk with him. Another Fearnow share recipient, Kevin Mulleady, was more explicit, writing the Fearnow recipients (but not Mr. Greebel) and "implor[ing] investors that have taken advantage of recent liquidity to reconfirm their commitment to the long-term success of Retrophin." A-6198-6199. The jury could have thought that this conduct itself constituted an effort to interfere with "the natural interplay of supply and demand" to the extent it sought to halt Pierotti's trading.

Shkreli took two other steps as well. Shkreli sought to expose Pierotti to material, non-public information about Retrophin through an e-mail on which Mr. Greebel commented. A-4968; A-7273-7274. And Shkreli sent a litigation threat to Pierotti and requested that Pierotti's brokerage put a temporary hold on his account. A-1403 (Tr. 5984-5985); A-6195-6197. The jury could

have concluded that this conduct also interfered with "the natural interplay of supply and demand" to the extent it interfered with Pierotti's trading.

To be sure, it is less likely that the jury convicted Mr. Greebel based on any of those activities, because there was strong evidence in the record that Shkreli deceived Mr. Greebel into believing that those activities were necessary because Pierotti had violated the agreement under which he had received the shares in the first place. Specifically, Shkreli claimed that Pierotti had agreed to perform services for Retrophin in exchange for the opportunity to purchase Fearnow shares and then absconded with the shares, breaking his promise. Mr. Greebel enlisted two Katten litigation partners to investigate Shkreli's allegations. They "spent a significant amount of time undertaking due diligence" on Retrophin's potential claims against Pierotti, including reviewing documents and conducting interviews with Shkreli and several Fearnow recipients. A-2510-2513 (Tr. 8874-8875, 8880, 8882, 8889). And they ultimately filed a lawsuit against Pierotti on that theory. A-2528 (Tr. 8947); *see generally Retrophin, Inc.* v. *Pierotti*, No. 651104/2013 (N.Y. Sup. Ct.).

In any event, none of that conduct constitutes market manipulation. Asking an individual not to trade is not manipulative, nor is trying to halt the individual's trading—particularly if the individual had stolen the shares (or otherwise had no right to them). And as with the other two categories of conduct, the jury's confusion would have been alleviated either by removing the

"natural interplay" language from the instruction or by adding language about the limitations discussed above. Once again, none of the conduct directed at Pierotti was "market activity" or sent a "false pricing signal to the market." *ATSI*, 493 F.3d at 100.

2. Given the three categories of conduct for which Mr. Greebel could have been convicted, the government cannot show that the instructional error was harmless. *See, e.g.*, *Silver*, 864 F.3d at 119. To the contrary, the jury was presented with multiple theories of conviction, many of which were invalid. *See Sheehan*, 838 F.3d at 121. In such circumstances, a new trial is required if "it is impossible to tell which theory formed the basis for conviction." *Id.*; *accord United States* v. *Foley*, 73 F.3d 484, 493-494 (2d Cir. 1996), *overruled in part on other grounds by Salinas* v. *United States*, 522 U.S. 52 (1997).

Looking to the evidence in the record, it is quite likely that the jury would not have convicted Mr. Greebel based on the remaining arguments made by the government regarding Count 8. Much of the government's argument concerning Count 8 rested on the premise that Shkreli controlled all of the Fearnow shareholders' positions in Retrophin. *See, e.g.*, A-156-157 (Tr. 1081-1083) (opening); A-2877 (Tr. 10333), A-2884-2885 (Tr. 10364, 10367) (closing); A-2980 (Tr. 10744), A-2995-2996 (Tr. 10805-10808) (rebuttal). Such a theory may have been plausible against Shkreli, but not against Mr. Greebel.

The witnesses who testified about communications on this topic with Shkreli were very clear both that Mr. Greebel did not participate in the communications and that they did not themselves tell Mr. Greebel about the communications. A-1078-1079 (Tr. 4776-4778); A-1169 (Tr. 5140); A-1392-1393 (Tr. 5940-5945), A-1478 (Tr. 6283-6284). Indeed, the evidence supporting the existence of the conspiracy was muddled. For example, Pierotti told the jury that he had discussed Shkreli's demands "a lot" with Marek Biestek, another recipient of the shares, and that they were "comfortable" that everything they were doing was "within the law." A-1393 (Tr. 5945-5946).

But the most powerful evidence of lack of knowledge came from an e-mail that Mr. Greebel sent to Biestek. Biestek had e-mailed Mr. Greebel privately to ask whether the Fearnow recipients could sell their shares. A-4946-4947. Flatly contradicting any notion that someone else controlled the shares, Mr. Greebel responded, "You can sell the stock however and to whomever you want," except to affiliates of the company. *Id.*

That evidence dooms any effort by the government to show that "the jury would have necessarily found [Mr. Greebel] guilty on one of the properly instructed theories of liability." *Sheehan*, 838 F.3d at 121 (citation omitted). To be sure, the jury was alternatively instructed on traditional false-statement fraud. *See* SPA-69-70. But that theory also turned on the notion that Shkreli

controlled the Fearnow shares, thus rendering SEC filings potentially misleading because they did not disclose that Shkreli had "beneficial ownership" of the shares. A-2879. But Mr. Greebel's involvement in the filings was minimal. Shkreli signed the filings, and an associate at Katten prepared and filed them. A-7693, A-8907-8920, A-8921-8933.

More fundamentally, without any confidence that there was proof beyond a reasonable doubt that Mr. Greebel *knew* Shkreli controlled the shares (or even that Shkreli did control the shares), the government cannot sustain the jury's conviction on Count 8 on that basis. The conviction of Count 8, like the conviction on Count 7, should be vacated.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY EXCLUDING EXPERT TESTIMONY ON THE SECURITIES-FRAUD COUNT

Even if the Court were to conclude that the jury instruction on Count 8 was correct, Mr. Greebel's conviction on that count cannot stand. The court's error in precluding expert testimony prejudiced his defense and independently requires vacatur of the conviction.

A. At trial, the defense sought to introduce evidence that market participants regularly engaged in two of the practices that the government incorrectly suggested constituted market manipulation: encouraging investors to hold, rather than trade, their shares, and distributing shares to investors who are favorably disposed to the company.

After the government developed its theory at trial that the distribution and holding of the Fearnow shares constituted a conspiracy to commit securities fraud, the defense noticed a supplemental opinion by its expert witness Stephen Ferruolo, dean of University of San Diego School of Law and a former partner at Goodwin Procter LLP. A-2034. He would have testified that "one of a company's goals" in going public is to "create an orderly and stable market." *Id.* Dean Ferruolo would also have testified that companies could "reasonably allocate [freely trading] shares to individuals who are friendly to the company and share the same goal of creating an orderly and stable market." *Id.*

The government objected to the proposed opinion, arguing in relevant part that the opinion was inappropriate because there were no formal "lock-up agreements" in the case. A-2112 (Tr. 7646). In response, defense counsel emphasized, "It's not about the lock-up agreement, but rather the lock-up agreement is the background to that opinion which is that to the extent there are freely traded shares that aren't subject to sales restrictions, companies can reasonably allocate them to individuals who are friendly to the company." A-2112 (Tr. 7647).

The district court excluded Dean Ferruolo's supplemental opinion. A-2279 (Tr. 8308-8309). It stated that the proposed opinion was "not appropriate . . . because I think we have a situation where he's discussing a lock-up

agreement, which is not what we have in the record here." A-2279 (Tr. 8308). It further stated that Dean Ferruolo would be making "an ultimate conclusion on the law . . . regarding whether or not something is permitted and lawful." A-2279 (Tr. 8309). In light of the district court's ruling, the defense ultimately elected not to call Dean Ferruolo as a witness at trial.

B. Although a district court "has great latitude in deciding whether to admit or exclude expert testimony," that latitude "does not mean immunity from accountability." *United States* v. *Onumonu*, 967 F.2d 782, 786 (2d Cir. 1992) (internal quotation marks and citation omitted). This Court will vacate a conviction if the court abused its discretion in excluding expert testimony and that exclusion was not harmless. *See, e.g.*, *Litvak*, 808 F.3d at 180. For example, a court commits reversible error when it excludes an expert opinion that "could have educated the jury" on "highly[] specialized" points of securities practice that go to a "central issue in the case." *Id.* at 182-183. And an error is not harmless if the reviewing court cannot "conclude with fair assurance that the errors did not substantially influence the jury." *Id.* at 184 (citation omitted).

To begin with, the district court's characterization of Dean Ferruolo's testimony as "discussing a lock-up agreement" was erroneous. A-2279 (Tr. 8308). Although *part* of Dean Ferruolo's proposed testimony concerned lock-up agreements, the argument and subsequent expert disclosure made clear

that Dean Ferruolo would also be connecting his testimony to the facts in the record. *See, e.g.*, A-2034; A-2036; A-2112-2113 (Tr. 7647, 7649). Specifically, Dean Ferruolo would have testified to companies' practice of "allocat[ing] [freely trading] shares to individuals who are friendly to the company and share the same goal of creating an orderly and stable market." A-2034. That would have directly addressed the distribution of the shares to the Fearnow recipients.

The court also excluded Dean Ferruolo's opinion on the ground that he was making "an ultimate conclusion on the law . . . regarding whether or not something is permitted and lawful." A-2279 (Tr. 8309). But "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). Accordingly, as long as a securities expert avoids rendering an opinion as to the legality of the defendant's conduct, this Court has recognized that areas such as common practice in the industry are the permissible subject of the expert's testimony. *See*, *e.g.*, *Marx & Co.* v. *Diners' Club Inc.*, 550 F.2d 505, 512 (2d Cir. 1977). The summary disclosure that Dean Ferruolo would have testified about how newly public companies can "reasonably allocate" shares echoes what this Court found appropriate in *Marx*. *Compare* A-2034 *with Marx*, 550 F.2d at 512.

C. The exclusion of Dean Ferruolo's supplemental opinion plainly prejudiced the defense, for two reasons. First, the government contended in

its closing argument that "put[ting] the shares in friendly hands" constituted part of a "scheme to control the price of stock." A-2995 (Tr. 10805). And the instruction on market manipulation invited conviction on that basis. *See* pp. 39-51, *supra*. Dean Ferruolo's testimony that companies routinely "allocate [freely trading] shares to individuals who are friendly to the company" would have directly and powerfully rebutted that notion. A-2034. It is hard to conceive of a more "central issue in the case" than that. *Litvak*, 808 F.3d at 182.

Moreover, this Court has previously vacated convictions when expert testimony "would have helped the jury to ascertain [the defendant's] true state of mind." *United States* v. *Diallo*, 40 F.3d 32, 34-35 (2d Cir. 1994); *Onumonu*, 967 F.2d at 786. This is in keeping with the general rule that "trial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind." *United States* v. *Collorafi*, 876 F.2d 303, 305 (2d Cir. 1989). Lack of specific intent to participate in any conspiracy was a key element of Mr. Greebel's defense on Count 8. A-2958-2960, A-2963-2966 (defense closing); SPA-69 (instructing the jury on the defense of good faith). And under the government's theory, the initial distribution of the shares to the Fearnow recipients was the first step in even the broad, purported conspiracy to "control" the Fearnow shares. A-2995 (Tr. 10805). Testimony that such conduct was not unusual would have been powerful support for the proposition

that Mr. Greebel had no reason to believe he was participating in any kind of conspiracy.

In sum, the exclusion of Dean Ferruolo's testimony was erroneous. And that error, like the instructional errors discussed above, requires vacatur of the conviction on Count 8.

CONCLUSION

The judgment of the district court should be vacated and the case remanded for a new trial.

Respectfully submitted,

/s/Kannon K. Shanmugam
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DECEMBER 21, 2018

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellant and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Brief of Defendant-Appellant is proportionately spaced, has a typeface of 14 points or more, and contains 12,921 words.

/s/Kannon K. Shanmugam
KANNON K. SHANMUGAM

DECEMBER 21, 2018

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant and a member of the Bar of this Court, certify that, on December 21, 2018, a copy of the attached Brief of Defendant-Appellant and Special Appendix, along with the volumes of the Appendix required to be filed electronically, was filed with the Clerk through the Court's electronic filing system. In addition, I certify that copies of the Brief of Defendant-Appellant, Special Appendix, and Appendix were sent, via third-party commercial carrier for delivery overnight, to the Clerk and to the following counsel:

Alixandra E. Smith, Esq.
Assistant United States Attorney
U.S. Attorney's Office for the Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201

I further certify that all parties required to be served have been served.

/s/Kannon K. Shanmugam
KANNON K. SHANMUGAM

Special Appendix

SPECIAL APPENDIX

TABLE OF CONTENTS

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
Evan Greebel

JUDGMENT IN A CRIMINAL CASE

Case Number: 15CR637[KAM]

USM Number: 87851-053

Reed M. Brodsky, Esq
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) Seven and Eight of an eight-count, superseding indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1349	Conspiracy to Commit Wire Fraud, Class C Felony	9/30/2014	7
18 U.S.C. § 371	Conspiracy to Commit Securities Fraud, Class D Felony		8

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/17/2018
Date of Imposition of Judgment

/s/ USDJ KIYO A. MATSUMOTO
Signature of Judge

Kiyo A. Matsumoto, USDJ
Name and Title of Judge

8/22/2018
Date

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AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Evan Greebel
CASE NUMBER: 15CR637[KAM]

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

18 months on each of Counts Seven and Eight, to run concurrently

☑ The court makes the following recommendations to the Bureau of Prisons:

The court respectfully recommends that, if deemed appropriate by the BOP, Mr. Greebel be designated to the FCI Otisville Satellite Camp, to facilitate family visits. In addition the BOP is requested to provide Mr. Greebel with alcohol abuse counseling and treatment services and the RDAP program.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 10/17/2018 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Evan Greebel
CASE NUMBER: 15CR637[KAM]

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three years supervised release on each count to run concurrently, with special conditions.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Evan Greebel
CASE NUMBER: 15CR637[KAM]

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Evan Greebel
CASE NUMBER: 15CR637 [KAM]

SPECIAL CONDITIONS OF SUPERVISION

a. Mr. Greebel shall comply with the restitution and forfeiture orders as set forth below and incorporated herein.

b. Mr. Greebel shall maintain full time verifiable employment and refrain from engaging in any self-employment which involves access to clients' assets, investments, or money, or solicitation of assets, investment, or money. He is to assist the Probation Department in verifying any employment he secures while under supervision. For the purposes of this order, "self-employment" includes companies or entities in which Mr. Greebel has a financial interest, derives any benefit, is a controlling or majority shareholder, or otherwise controls or directs the operations of the entity.

c. Mr Greebel shall serve 20 hours of community service under the supervision of Probation if he is not employed full-time.

d. Mr. Greebel shall provide the Probation Department and the United States Attorney's Office with complete and truthful disclosure of his financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings or other financial accounts for either personal or business purposes without the knowledge and prior approval of the Probation Department. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income and expenses. Mr. Greebel shall cooperate in the signing of any necessary authorizations to release information forms permitting the US Probation Department access to his financial information and records.

e. Mr. Greebel shall participate in alcohol abuse counseling and treatment services under the supervision of Probation and provide truthful and complete financial disclosure to the Probation Department which it may consider in assessing his ability to pay for services.

RESTITUTION

Restitution is ordered in the amount of $10,447,979.00 due immediately as set forth herein, to the Clerk of Court, U.S. District Court, 225 Cadman Plaza East, Brooklyn, New York 11201, and shall reference the word "restitution", the docket number and case name. The Clerk of Court shall forward restitution payments of $10,447,979.00, to Retrophin, Inc, located at: 3721 Valley Centre Drive, Suite 200, San Diego, CA 92130. The Clerk of Court will distribute payments to the victim. Restitution is due and payable immediately from available assets or shall be paid at a minimum quarterly rate of $25 while in custody, and 15% of his gross monthly income after deductions required by law, or $500 per month, whichever is greater, until paid in full. Payments shall begin on the first day of the first month following defendant's release from custody and shall continue until paid in full.

FORFEITURE

Pursuant to 18 U.S.C. § 981(a)(1)(C), and 28 U.S.C. § 2461(c), and 21 U.S.C. § 853(p), Mr. Greebel is Ordered to pay a forfeiture money judgment in the amount of one hundred sixteen thousand, four hundred sixty-two dollars and three cents ($116,462.03), as property constituting, or derived from, proceeds obtained directly or indirectly, as a result of his offense, and/or as substitute assets. Forfeiture amount of $116,462.03 is due immediately and payable as set forth herein, to the United States Attorney's Office, Eastern District of New York, 271-A Cadman Plaza East, Brooklyn, New York 11201, Attn: Assest Forfeiture Unit, and shall reference the word "forfeiture", the docket number and case name. The Forfeiture amount is due and payable immediately from available assets and shall be paid at a minimum quarterly rate of $25 while in custody, and 15% of his gross monthly income after deductions required by law, or $500 per month, whichever is greater, until paid in full. Payments shall begin on the first day of the first month following defendant's release from custody and shall continue until paid in full. The Court has "so ordered" the Forfeiture Order in the amount of $116,462.03. It is incorporated into this Judgment and attached hereto.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Evan Greebel
CASE NUMBER: 15CR637[KAM]

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$	$ 0.00	$ 10,447,979.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Retrophin, Inc. 3721 Valley Centre Drive, Suite 200 San Diego, CA 92130	$10,447,979.00	$10,447,979.00	

TOTALS	$ 10,447,979.00	$ 10,447,979.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Evan Greebel
CASE NUMBER: 15CR637 [KAM]

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 10,448,179.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☑ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Restitution is ordered in the amount of $10,447,979.00 due immediately as set forth herein, to the Clerk of Court, U.S. District Court, 225 Cadman Plaza East, Brooklyn, New York 11201, and shall reference the word "restitution", the docket number and case name. The Clerk of Court shall forward restitution payments of $10,447,979.00, to Retrophin, Inc, located at: 3721 Valley Centre Drive, Suite 200, San Diego, CA 92130. The Clerk of Court will distribute payments to the victim. Restitution is due and payable immediately from available assets or shall be paid at a minimum quarterly rate of $25 while in custody, and 15% of his gross monthly income after deductions required by law, or $500 per month, whichever is greater, until paid in full. Payments shall begin on the first day of the first month following defendant's release from custody and shall continue until paid in full. Restitution has priority over the forfeiture if not paid in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
Forfeiture amount of $116,462.03 is due immediately as set forth herein, to the United States Attorney's Office, Eastern District of New York, 271-A Cadman Plaza East, Brooklyn, New York 11201, Attn: Asset Forfeiture Unit, and shall reference the word "forfeiture", the docket number and case name. The Forfeiture amount is due and payable immediately from available assets and shall be paid at a minimum quarterly rate of $25 while in custody, and 15% of his gross monthly income after deductions required by law, or $500 per month, whichever is greater, until paid in full. Payments shall begin on the first day of the first month following defendant's release from custody and shall continue until paid in full. The Order of Forfeiture is attached hereto and incorporated herein as part of this Judgment

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Jury Instructions
December 22, 2017

Court Exhibit 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
-against-	
	15-CR-637 (KAM)
EVAN GREEBEL,	
Defendant.	

JURY INSTRUCTIONS

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Jury Instructions
December 22, 2017

INTRODUCTION

You are about to enter your final duty, which is to decide the factual issues in the case. I ask that you please pay close attention to me now. I will go as slowly as I can and be as clear as possible.

I told you at the very start of the trial that your principal function during the trial would be to listen carefully and observe each witness who testified. It has been obvious to me and to counsel that you have faithfully discharged this duty, and I thank you for your attentiveness and service. Now that you have heard all of the evidence in this case and the arguments of each side, it is my duty to give you instructions as to the applicable law. My instructions will be in three parts:

First: I will state some general rules about your role and the way in which you are to review the evidence in this case;

Second: I will instruct you as to the two crimes charged in this case and the elements that the government must prove beyond a reasonable doubt with respect to each; and

Third: I will give you some general rules regarding your deliberations.

Jury Instructions
December 22, 2017

Do not single out any one instruction I give you as alone stating the law. Rather, you should consider these instructions as a whole when you retire to the jury room to deliberate on your verdict.

I. GENERAL RULES OF LAW

1. Role of the Court

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the government and for the defendant, Evan Greebel.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. Even if any attorney or witness has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be — or ought to be — it

would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

2. Role of the Jury

As members of the jury, you are the sole and exclusive judges of the facts. Your role is to pass upon the weight of the evidence; determine the credibility of the witnesses; resolve such conflicts as there may be in the testimony; and draw whatever reasonable inferences you decide to draw from the facts as you have determined them.

In determining the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions, is not evidence. Nor is anything I may have said during the trial or may say during these instructions with respect to a factual matter to be taken in substitution for your own independent recollection. What I say is not evidence.

The evidence before you consists of the answers given by witnesses — the testimony they gave, as you recall it – and the exhibits and stipulations that were received in evidence.

The evidence does not include questions. Only the answers are evidence. But you may not consider any answer that I

directed you to disregard or that I directed struck from the record. Do not consider such answers.

Throughout this trial, I have reminded you not to conduct any outside research into this case. I have also instructed you to consciously avoid any media about this case. Likewise, during deliberations, you may only consider the evidence admitted at trial and may not utilize any other information obtained outside the courtroom, including, but not limited to, research on the internet, opinions or statements outside the courtroom, or other sources. You must completely disregard any media reports about this case that you have read in the press, seen on television, or heard on the radio. Indeed, it would be unfair to consider such reports, since they are not evidence and the parties have no opportunity of contradicting their accuracy or otherwise explaining them away. In short, it would be a violation of your oath as jurors to allow yourselves to be influenced in any manner by such media.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision

should be as to whether or not the government has proven that Mr. Greebel is guilty beyond a reasonable doubt.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render or whether any of the witnesses may have been more credible than any other witness. You are expressly to understand that the court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to consider the evidence with impartiality. Your verdict must be based solely upon the evidence developed at trial or the lack of evidence.

In reaching your decision as to whether the government sustained its burden of proof, it would be improper for you to consider any personal feelings you may have about Mr. Greebel's race, religion, national origin, sex, age, or profession. It would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process. All persons are entitled to the presumption of innocence from the start of the trial through

the end, and that presumption of innocence remains unless and until you have decided unanimously that the government has met its burden of proof, which I will discuss in a moment.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, are equal before the law.

If you have a reasonable doubt as to Mr. Greebel's guilt as to a particular count, you should not hesitate for any reason to find a verdict of acquittal or not guilty on that count. But on the other hand, if you should find that the government has met its burden of proving that Mr. Greebel is guilty beyond a reasonable doubt as to a particular count, you should not hesitate because of fear or prejudice or bias or sympathy to render a verdict of guilty on that count.

Under your oath as jurors, you are not to be swayed by sympathy. You are to be guided solely by the evidence in this case, and the crucial question that you must ask yourselves as you sift through the evidence is: Has the government proven that Mr. Greebel is guilty of each count beyond a reasonable doubt?

It is for you alone to decide whether the government has proven that Mr. Greebel is guilty of each of the two counts charged, solely on the basis of the evidence and subject to the law as I charge you. If you follow your oath, and try the issues without fear or prejudice or bias or sympathy, you will arrive at a true and just verdict.

3. Conduct of Counsel

It is the duty of the attorneys on each side of a case to object when the other side offers testimony or other evidence which the attorneys believe is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his or her client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury, or asked the court for a ruling on the law.

During the course of the trial, I may have admonished an attorney. You should draw no inference against the attorney or the client. It is the duty of the attorneys to offer evidence and press objections on behalf of their client. It is my

function to cut off counsel from an improper line of argument or questioning, and to strike answers when I think it is necessary. But you should draw no inference from that.

In fact, in this case, I would like to express my gratitude to each of the attorneys for their conscientious efforts on behalf of their clients and for work well done.

4. Presumption of Innocence and Burden of Proof

Evan Greebel is before you today because he has been charged in a Superseding Indictment with violating federal law in two counts. The Superseding Indictment is merely a statement of charges, and is not itself evidence. Mr. Greebel has pleaded not guilty to the two crimes with which he is charged in the Superseding Indictment. Mr. Greebel is therefore presumed to be innocent of the charges against him, and that presumption alone, unless overcome, is sufficient to acquit him.

To convict Mr. Greebel, the burden is on the government to prove each and every element of each of the two charged crimes beyond a reasonable doubt. This burden never shifts to a defendant, for the simple reason that the law presumes Mr. Greebel to be innocent. Mr. Greebel is not required to prove that he is innocent and has no burden or duty to call any witness or produce any evidence.

Every defendant starts with a clean slate and is presumed innocent of each of the charges until such time, if ever, that you as a jury are satisfied that the government has proven the defendant guilty of a given charge beyond a reasonable doubt. If the government fails to prove every element of a charge beyond a reasonable doubt, you must find Mr. Greebel not guilty as to that charge.

5. Reasonable Doubt

What is a reasonable doubt? It is a doubt based on reason. It is doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of a convincing character that a reasonable person would not hesitate to rely on in making an important decision in his or her life.

A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict.

If, after fair and impartial consideration of all of the evidence or lack of evidence concerning a particular charge against Mr. Greebel, you have a reasonable doubt, you must find Mr. Greebel not guilty of that charge. On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied that the government has proven that Mr. Greebel is guilty beyond a reasonable doubt, you should find Mr. Greebel guilty of that charge.

6. Forms of Evidence

I now will instruct you as to what is evidence and how you should consider it.

A. **What Is Evidence:**

The evidence in this case comes in several forms:

1. Sworn testimony of witnesses, including expert witnesses, both on direct and cross-examination;

2. Exhibits that have been received by the court in evidence;

3. Certain exhibits admitted in evidence in the form of charts, summaries and demonstratives may be considered for the purposes for which they have been offered. You should consider these charts

and summaries as you would any other evidence; and

4. Stipulations of fact to which all the attorneys have agreed. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Here, the attorneys for the government and the attorneys for Mr. Greebel have entered into stipulations concerning the admission of certain facts and documents that are relevant to this case. You should accept these stipulations as evidence and regard those facts as true, to be given whatever weight you choose.

If I instructed you that a certain document or statement was received in evidence for a limited purpose, you must consider that document or statement for that limited purpose only.

B. **What Is Not Evidence:**

Certain things are not evidence and are to be disregarded by you in deciding what the facts are:

1. The Superseding Indictment is not evidence and is entitled to no weight in your evaluation of the facts.

2. Arguments or statements by the attorneys are not evidence.

3. A lawyer's questions of a witness in and of themselves are not evidence - only the answer constitutes evidence.

4. Objections to the questions or to offered exhibits are not evidence. Attorneys have a duty to object when they believe evidence should not be received. You should not be influenced by the objection or by the court's ruling on it. If the objection was sustained, ignore the question. If the objection was overruled, treat the answer like any other answer.

5. Any testimony and statements stricken by the court are not evidence.

6. Any exhibits identified, but not admitted into evidence by the court, are not evidence, however, testimony regarding such exhibits is evidence. You should disregard any gaps in numbering between exhibits.

7. Any redacted portions of any exhibits are not themselves evidence, and you should not speculate as to why the exhibit was redacted and what might be contained in any redacted portions of an exhibit.

8. Obviously, anything you may have seen or heard outside the courtroom is not evidence.

9. Any notes you may have taken during the course of the trial are not evidence.

Your verdict must be based exclusively upon the evidence or the lack of evidence in this case.

7. Evidence Offered "Not for the Truth"

I have instructed you during the trial that certain documents or statements were received in evidence not for their truth. When a document or statement is admitted 'not for the truth,' it means that the statement is not being offered to

prove the truth of the matter asserted in the document or statement.

Statements introduced 'not for the truth' were introduced for one or more limited purposes. These limited purposes are to demonstrate a person's state of mind or future intent, show the effect of a document or statement on a person who received it, or assess a witness's credibility. I have also received documents or statements in evidence for the limited purposes of showing simply that a particular statement or document was made or transmitted, providing background, or giving context to other evidence admitted during the trial.

If I instructed you that a certain document or statement was received in evidence for a limited purpose, you should consider that document or statement only for that limited purpose or purposes.

8. Direct and Circumstantial Evidence:

I told you that evidence comes in various forms such as the sworn testimony of witnesses, expert witnesses, exhibits, charts and summaries, and stipulations. There are, in addition, different types of evidence - direct and circumstantial.

1. **Direct evidence:** Direct evidence is evidence that proves a fact directly. For example, when a

witness testifies to what he or she saw, heard or observed, that is called direct evidence.

2. **Circumstantial evidence:** Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but the courtroom blinds were drawn and you could not look outside. Then later, as you were sitting here, several people walked in with dripping wet umbrellas and dripping wet raincoats. Because you cannot look outside of the courtroom and cannot see whether or not it is raining, you have no direct evidence that it is raining. But, on the combination of the facts about the dripping wet umbrellas and raincoats, it would be reasonable for you to infer that it had begun to rain. That is all there is to circumstantial evidence. Using your reason and experience, you infer from established facts the existence or the nonexistence of some other fact. Whether a given inference should be drawn is

entirely a matter for you, the jury, to decide. Please note, however, that drawing an inference is not a matter of speculation or guess; it is a matter of logical inference.

The law makes no distinction between direct and circumstantial evidence. Circumstantial evidence is of no less value than direct evidence, and you may consider either or both, and may give them such weight as you conclude is warranted.

9. Inferences

The attorneys have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The government may ask you to draw one set of inferences, while the defense may ask you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An

inference is a deduction or conclusion that you, the jury, are permitted to draw – but not required to draw – from the facts that have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

So, while you are considering the evidence presented to you, you are permitted, but not required, to draw from the facts that you find to be proven such reasonable inferences as would be justified in light of your experience.

Here again, let me remind you that, whether based on direct or circumstantial evidence, or on the logical, reasonable inferences drawn from such evidence, you must be satisfied that the government has proven that Mr. Greebel is guilty beyond a reasonable doubt before you may convict on either charge.

10. Credibility of Witnesses

You the jury are the sole judges of the credibility – or believability – of the witnesses and the weight their testimony deserves. You should carefully scrutinize all of the testimony given, the circumstances under which each witness testified, and any other matter in evidence that may help you to decide the truth and the importance of each witness's testimony.

Your decisions in this respect may depend on how each witness impressed you. Was the witness candid and forthright or did the witness seem to be hiding something, being evasive or suspect in some way? How did the witness's testimony on direct examination compare with the witness's testimony on cross-examination? Was the witness consistent in the testimony given or were there contradictions? Did the witness appear to know what she or he was talking about and did the witness strike you as someone who was trying to report that knowledge accurately? These are examples of the kinds of common sense questions you should ask yourselves in deciding whether a witness is, or is not, truthful.

You should also consider whether a witness had an opportunity to observe the facts he or she testified about. Also, you should consider whether the witness's recollection of the facts stands up in light of the other evidence in the case.

How much you choose to believe a witness may also be influenced by the witness's bias. Does the witness have a relationship with the government or Mr. Greebel that may affect how he or she testified? Does the witness have some incentive, loyalty, or motive that might cause him or her to shade the truth? Does the witness have some bias, prejudice, or hostility

that may cause the witness to give you something other than a completely accurate account of the facts he or she testified to?

Evidence that a witness is biased, prejudiced or hostile, toward either Mr. Greebel or the government, requires you to view that witness's testimony with caution, to weigh it with care, and to subject it to close and searching scrutiny.

You should also take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

You have also heard evidence of what counsel claim are discrepancies in the testimony of certain witnesses, and counsel have argued that such discrepancies are a reason for you to

reject the testimony of those witnesses. Evidence of discrepancies may be a basis to disbelieve a witness's testimony. On the other hand, discrepancies in a witness's testimony or between his or her testimony and that of others do not necessarily mean that the witness's entire testimony should be discredited. People sometimes forget things and even a truthful witness may be nervous and contradict him- or herself. It is also a fact that two people witnessing an event may see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

A willful falsehood always is a matter of importance and should be considered seriously. If any witness is shown to have willfully lied about any material matter, you have the right to conclude that the witness also lied about other matters. You may either disregard all of that witness's testimony, or you may accept whatever part of it you think deserves to be believed. It is for you to decide, based on your total impression of a witness, how to weigh his or her testimony. You should, as always, use common sense and your own good judgment.

11. Impeachment of Witnesses

You do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You may, but need not, find that a witness is contradicted or impeached, for example, if you find that he or she testified to something that was inconsistent with what he or she testified to in the past, or which was inconsistent with documents, the testimony of another witness, or other evidence. You also have to decide which witnesses to believe and which facts are true. To do this you must look at all the evidence, drawing upon your own common sense and personal experience. You should keep in mind that the burden of proof beyond a reasonable doubt is always on the government and that Mr. Greebel is not required to call any witnesses or offer any evidence, because he is presumed to be innocent.

12. Defendant's Right Not to Testify

Mr. Greebel did not testify in this case. Under the United States Constitution, a defendant has no obligation to testify or to present any evidence, because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to the defendant.

Mr. Greebel is not required to prove that he is innocent, because his innocence as to each charge is presumed unless and until you find unanimously that the government has met its burden of proving that Mr. Greebel is guilty beyond a reasonable doubt.

Therefore, you must not attach any significance to the fact that Mr. Greebel did not testify in this case. You must not draw any adverse inference against him because he did not take the witness stand and you may not consider or even discuss it in any way in your deliberations in the jury room.

13. Testimony of Government Employees/Law Enforcement Witnesses

In this case, you have also heard testimony from witnesses who work for the FBI, a law enforcement agency. The testimony of those witnesses should be evaluated in the same manner as the testimony of any other witness. The fact that a witness may be employed by the government does not mean that you may accord his or her testimony any more or less weight than that of any other witness. At the same time, defense counsel may question the credibility of a witness employed by the government, including a witness who works in law enforcement, on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is for you to decide, after weighing all the evidence, in light of the instructions I have given you about factors relevant to determining the credibility of any witness, whether you accept the testimony of a government employee witness and what weight, if any, it deserves.

14. Expert Witnesses

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to

testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

15. Prior Inconsistent Statements

You have heard evidence that some witnesses made statements on earlier occasions, and counsel have argued that these prior statements are inconsistent with the trial testimony of these witnesses. Evidence of what counsel argues are arguably prior inconsistent statements was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witness who arguably contradicted himself or herself. If you find that the witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent and, if so, how much, if any, weight should be given to the inconsistent statement in determining whether to believe all, part, or none of the witness's testimony.

16. Preparation for Testimony

During the course of trial, you heard testimony that the attorneys for the parties interviewed witnesses when preparing for and during trial. Attorneys have an obligation to prepare their case as thoroughly as possible, and in the discharge of that responsibility properly interview witnesses in preparation for the trial and from time to time as may be required during the course of the trial.

17. No Duty to Call Witnesses or Produce Evidence or Use Particular Investigative Techniques

Although the government bears the burden of proof beyond a reasonable doubt, and although a reasonable doubt can arise from lack of evidence, you are instructed that there is no legal requirement that the government use any specific investigative techniques or pursue every investigative lead to prove its case. The government, its agents and employees are

not on trial. Therefore, although you are to carefully consider the evidence adduced by the government, you are not to speculate as to why they used the techniques they did or why they did not use other techniques.

In this regard, I also charge you that all persons who may have been present at any time or place mentioned in the case, or who may appear to have some knowledge of the issues in this case, need not be called as witnesses. Both the government and the defense have the same right to subpoena witnesses to testify on their behalf. There is no duty on either side, however, to call a witness whose testimony would be merely cumulative of testimony already in evidence, or who would merely provide additional testimony to facts already in evidence. Nor does the law require that all things mentioned during the course of the trial be produced as exhibits. I remind you, however, that because the law presumes that Mr. Greebel is innocent, the burden of proving his guilt beyond a reasonable doubt is on the government throughout the trial. Mr. Greebel does not have the burden of proving his innocence or of producing any evidence or calling any witnesses at all.

18. Informal Agreements

You have heard testimony from Alan Geller, who has been promised by the government that in exchange for testifying truthfully, completely, and fully, he will not be prosecuted for making false statements to the FBI and that the government will not use his statements in court or in interviews with the government against him. You also have heard testimony from Jackson Su, who has been promised by the government that it will not use his testimony in court in any subsequent prosecution against him, except in any prosecution for perjury, false statements or obstruction of justice. These promises were not a formal order of immunity by the court, but were arranged directly between the witnesses and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such a witness' testimony alone, if you find that his testimony proves the defendant guilty beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he will not be prosecuted or who has been granted immunity for his testimony by the government should be examined

by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interests, because such a witness, confronted with the realization that he can win his own freedom from prosecution by helping to convict another, has a motive to falsify his testimony.

Such testimony should be received by you with suspicion and you may give it such weight, if any, as you believe it deserves.

19. Consider Only this Defendant

You have heard evidence about the involvement of certain other people in the crimes charged in the Superseding Indictment. You may not draw any inference, favorable or unfavorable, towards the government or Mr. Greebel from the fact that certain persons are not on trial before you. It is not your concern that these other individuals are not on trial before you, nor should you speculate as to whether or not they were indicted. You should neither speculate as to the reason these other people are not on trial before you, nor allow their absence as parties to influence in any way your deliberations in this case. Nor should you draw any inference from the fact that

any other person is not present at this trial or may or may not be indicted. Your concern is solely the person on trial before you, Mr. Greebel.

Your verdict should be based solely upon the evidence or lack of evidence as to Mr. Greebel, in accordance with my instructions and without regard to whether the guilt of other people has or has not been proven.

20. Approximate Dates

The Superseding Indictment charges that the offenses at issue took place "in or about" and "between" certain dates. The proof need not establish with certainty the exact date of the alleged offenses. The law requires a substantial similarity between the date alleged in the Superseding Indictment and the date established by the evidence.

II. THE CHARGES

I will now turn to the second part of my instructions. In this part, I will instruct you as to the specific elements of the crimes charged that the government must prove beyond a reasonable doubt to warrant a finding of guilt in this case.

Jury Instructions
December 22, 2017

1. Summary of the Superseding Indictment; Consider Only the Charges; Consider Each Count Separately

I will begin by summarizing for you the two charges alleged in the Superseding Indictment, which as I mentioned is merely a statement of the charges, and is not evidence. Mr. Greebel is not charged with committing any crime other than the offenses contained in the Superseding Indictment.

The Superseding Indictment contains a total of two counts against Mr. Greebel. Each of the two counts charges Mr. Greebel with a different crime related to an entity known as Retrophin. In one of the counts of the Superseding Indictment, Mr. Greebel is charged with conspiracy to commit wire fraud, and in the other count, he is charged with conspiracy to commit securities fraud.

You must consider each of the two counts of the Superseding Indictment separately, and you must return a separate verdict for each count. Whether you find Mr. Greebel guilty or not guilty as to one offense charged in a count should not affect your verdict as to the offense charged in the other count. For the sake of clarity, I will refer to the two counts as Count One and Count Two.

2. Knowingly, Willfully, and Intentionally Defined

During these instructions, you will hear me use the terms "knowingly," "willfully," and "intentionally." Therefore, I will define these terms for you.

A. Knowingly

To act "knowingly" means to act intentionally and voluntarily, and not because of ignorance, mistake, accident, negligence, or carelessness, or as a result of being misled or deceived. Whether Mr. Greebel acted knowingly may be proven by his conduct and by evidence of all of the facts and circumstances surrounding the case.

B. Willfully

"Willfully" means to act with knowledge that one's conduct is unlawful and with an intent to do something the law forbids; that is to say, with a bad purpose either to disobey or to disregard the law. A defendant's conduct is not "willful" if it was due to negligence, inadvertence, or mistake.

C. Intentionally

A person acts "intentionally" when he acts deliberately and purposefully. That is, the defendant's acts must have been the product of his conscious objective decision rather than the product of a mistake or accident.

Whether a person acted knowingly, willfully, or intentionally is a question of fact for you to determine, like any other fact question. Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required. The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom. In either case, the government must prove the elements of the crime charged beyond a reasonable doubt.

COUNT ONE: Conspiracy to Commit Wire Fraud

Count One of the Superseding Indictment charges Mr. Greebel with conspiracy to commit wire fraud as to Retrophin as follows:

> In or about and between February 2011 and September 2014, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EVAN GREEBEL, together with others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud Retrophin, and to obtain money and property from Retrophin by means of

materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, contrary to Title 18, United States Code, Section 1343.

The defendant denies the charge.

1. Conspiracy to Commit Wire Fraud

I will now explain what it means to conspire to commit wire fraud. The relevant statute is Title 18, Section 1349 of the United States Code, which provides, in relevant part, that it shall be unlawful for any person to "conspire[] to commit" wire fraud.

A conspiracy is a kind of criminal partnership, at the heart of which is an agreement or understanding by two or more persons to violate other laws. A conspiracy to commit a crime is an entirely separate and different offense from the underlying crime that the conspirators intended to commit. Thus, if a conspiracy exists, the conspiracy is still punishable as a crime, even if it should fail to achieve its purpose of the underlying substantive crime. A defendant may be found guilty of conspiracy even if he was incapable of committing the underlying substantive crime. Consequently, for Mr. Greebel to be guilty of conspiracy, there is no need for the government to

prove that he or any other conspirator actually succeeded in their criminal goals or even that they could have succeeded as to the underlying substantive crime. With respect to Count One, the government alleges that Mr. Greebel conspired with others to defraud Retrophin in order to obtain Retrophin assets by wire fraud.

To prove the crime of conspiracy to commit wire fraud, the government must prove two elements beyond a reasonable doubt:

First, that Mr. Greebel and at least one other person entered into an agreement to commit wire fraud, a crime I will define for you; and

Second, that Mr. Greebel knowingly and intentionally became a member of the conspiracy.

You must reach a unanimous decision in connection with each element. I will now describe these elements.

A. **First Element: Existence of the Agreement**

The first element that the government must prove beyond a reasonable doubt for Count One is that Mr. Greebel and at least one other person entered into the charged agreement to commit wire fraud. One person cannot commit a conspiracy alone. Rather, the proof must convince you that at least two persons

joined together in a common criminal scheme. The government need not prove that members of the conspiracy met together or entered into any express or formal agreement. You need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or the means by which the scheme was to be accomplished. It is sufficient if the government proves, beyond a reasonable doubt, that the conspirators tacitly came to a mutual understanding to accomplish an unlawful act by means of a joint plan or common design. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement.

You may, of course, find that the existence of an agreement between two or more persons to violate the law has been established by direct proof. But since, by its very nature, a conspiracy is characterized by secrecy to conceal the unlawful agreement, direct proof may not be available. Therefore, you may, if you choose, infer the existence of a conspiracy from the circumstances of this case and the conduct of the parties involved. In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In determining whether an agreement existed here, you may consider

the actions and statements of all those you find to be participants in the conspiracy as proof that a common design existed to act together for the accomplishment of the unlawful purpose stated in the Superseding Indictment.

B. **Second Element: Membership in the Conspiracy**

The second element the government must prove beyond a reasonable doubt for Count One is that Mr. Greebel knowingly and intentionally became a member in the charged conspiracy. I have explained to you what it means to act knowingly and intentionally, and I refer you to those instructions. (See pp. 33-34.) As I explained, a person acts knowingly and intentionally if he acts voluntarily, deliberately, and purposefully, and not because of ignorance, mistake, accident, negligence or carelessness. In other words, did Mr. Greebel participate in the conspiracy with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective? Knowledge and intent may be inferred from a secretive or irregular manner in which activities are carried out. Whether a defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case.

In order for Mr. Greebel to be deemed a member of a conspiracy, he need not have had a stake in the venture or its outcome. While proof of a financial or other interest in the outcome of a scheme is not required, if you find that Mr. Greebel did have such an interest, it is a factor you may properly consider in determining whether or not he was a member of the conspiracy charged in the Superseding Indictment.

Mr. Greebel's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators, and the reasonable inferences that may be drawn from them.

A defendant's knowledge may be inferred from the facts proved. In that connection, I instruct you that, to become a member of the conspiracy, a defendant need not have been apprised of all of the activities of all members of the conspiracy. Moreover, a defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on his part. In addition, a defendant need not have joined in all of the conspiracy's unlawful objectives.

Each member of a conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. Even a single act may be sufficient to draw a defendant within the ambit of the conspiracy. The key inquiry is simply whether a defendant joined the conspiracy charged with an awareness of at least some of the basic aims and purposes of the unlawful agreement and with the intent to help it succeed.

In considering whether a defendant participated in a conspiracy, be advised that a conspirator's liability is not measured by the extent or duration of his participation as he need not have been a member of the conspiracy for the entire time of its existence. I caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. Mere presence during the commission of a crime, even when coupled with knowledge that a crime is being committed, is insufficient to prove membership in a conspiracy. More is required under the law.

What is required is that a defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends. In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking.

If you find that the government has not proven either of these elements beyond a reasonable doubt, then you must find Mr. Greebel not guilty of Count One.

C. **Venue**

I have explained to you the elements the government must prove beyond a reasonable doubt as to Count One. In addition, the government must prove that venue is proper in the Eastern District of New York. Unlike the elements of conspiracy which the government must prove beyond a reasonable doubt, the government must prove that venue is proper by a preponderance of the evidence. To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not. A preponderance of the evidence means the greater weight of the evidence, both direct and circumstantial. It refers to

the quality and persuasiveness of the evidence, not to the quantity of evidence.

Thus, as to the conspiracy charged in Count One, the government must prove that it is more likely than not that the agreement was formed or that an overt act in furtherance of the conspiracy was committed in the Eastern District of New York, which includes the boroughs of Queens, Brooklyn (also known as Kings County), Staten Island (also known as Richmond County), and the counties of Suffolk and Nassau, New York. In this regard, the government need not prove that the crime charged was committed in the Eastern District of New York or that Mr. Greebel or any alleged co-conspirator was even physically present here. It is sufficient to satisfy the venue requirement if an overt act in furtherance of the conspiracy occurred within the Eastern District of New York. This includes not just acts by Mr. Greebel or any alleged co-conspirator, but also acts that the conspirators caused others to take that materially furthered the ends of the conspiracy.

Therefore, if you find that it is more likely than not that an overt act in furtherance of the conspiracy took place in the Eastern District of New York, the government has satisfied its burden of proof as to venue for Count One.

Again, I caution you that the preponderance of the evidence standard applies only to venue. The government must prove each of the elements of both counts beyond a reasonable doubt.

2. Wire Fraud: Definition and Elements

I will now define wire fraud, which is alleged to be the object of the conspiracy charged in Count One involving Retrophin. The relevant statute regarding wire fraud is Section 1343 of Title 18 of the United States Code, which provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be [guilty of a crime].

Mr. Greebel is not charged with wire fraud itself, but with conspiracy to commit wire fraud. Thus, the government need not prove that Mr. Greebel actually committed wire fraud, but, in order for you to find Mr. Greebel guilty of Count One, it must prove that Mr. Greebel conspired with at least one other person *with the intent* to commit each element of wire fraud. I will now describe the elements of wire fraud, as they relate to the conspiracy charged in Count One.

A. **First Element – Existence of a Scheme or Artifice to Defraud**

The first element of wire fraud is that there was a scheme or artifice to defraud by means of false or fraudulent pretenses, representations or promises. Thus, because Count One charges a conspiracy to commit wire fraud, the government must prove, beyond a reasonable doubt, that Mr. Greebel, along with at least one other person, conspired to defraud Retrophin by means of false or fraudulent pretenses, representations or promises.

A "scheme or artifice" is simply a plan for the accomplishment of an objective. "Fraud" is a general term which embraces all the various means that an individual can devise and that are used by an individual to gain an advantage over another by false representations, suggestions, suppression or omission of the truth, or deliberate disregard for the truth.

A "scheme or artifice to defraud" for the purposes of the wire fraud statute is any plan, device, or course of action designed to obtain money or property by means of false representations or omissions. Thus, a "scheme to defraud" is a plan to deprive another of money or property by trick, deceit, deception or swindle, or overreaching. A statement,

representation, claim, or document is false if it is untrue when made and was known at the time to be untrue by the person making it or causing it to be made. A representation or statement is fraudulent if it was falsely made with the intention to deceive.

The expression of an opinion not honestly entertained may constitute a false or fraudulent representation. Deceitful statements of half-truths or the concealment or omission of material facts, when under a duty to disclose these material facts, may also constitute false or fraudulent representations. A duty to disclose can arise in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading.

A duty to disclose material facts may also arise in the context of a fiduciary relationship, such as the attorney-client relationship. As a result of this relationship, an attorney must act on behalf of, and for the exclusive benefit of, the attorney's client, rather than for the benefit of the attorney or any other party. I instruct you that a fiduciary owes a duty to disclose all material facts known to him or her concerning the transaction entrusted to it. The concealment by a fiduciary of material information which he or she knows and is under a duty to disclose to another, under circumstances where

the non-disclosure can or does result in harm to the other, can be a fraudulent representation in violation of the wire fraud statute, if the government has proven beyond a reasonable doubt the other elements of the offense.

With regard to fiduciary duty, in order for a failure to disclose material information to constitute a fraudulent representation for purposes of the wire fraud statute, the defendant must have known such disclosure was required to be made, and must have failed to make such disclosure with the intent to defraud.

The fraudulent representation must relate to a material fact or matter. A material fact in the context of wire fraud is one that reasonably would be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision. A scheme to defraud does not exist when the alleged false representations or omissions were not directed to the nature of the bargain.

The deception need not be premised upon spoken or written words alone. The arrangement of words, or the circumstances in which they are used may convey a false and deceptive appearance. If there is intentional deception, the manner in which it is accomplished does not matter.

It is not necessary that the government prove that the defendant actually realized any gain from the scheme or that the intended victim actually suffered any loss.

B. **Second Element – Participation in Scheme with Intent**

The second element of wire fraud is that the defendant participated in the scheme to defraud knowingly, willfully and with the specific intent to defraud.

I already instructed you as to the meaning of "knowingly" and "willfully." I refer you to those instructions as they apply here also. (See pp. 33-34.) For the purposes of the wire fraud statute, an "intent to defraud" means to act knowingly and with specific intent to deceive for the purpose of causing some financial or property loss to another. Thus, for the purposes of the conspiracy charged in Count One, in order to establish that Mr. Greebel conspired to defraud Retrophin as charged in Count One, the government must prove that he intended to deceive and thereby to deprive Retrophin of money or property.

I will remind you, however, that the question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves Mr. Greebel's state

of mind. As I said before, direct proof of knowledge and fraudulent intent is not necessary. The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his or her words, his or her conduct, his or her acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them. Circumstantial evidence, if believed, is of no less value than direct evidence.

Under the wire fraud statute, even false representations or statements, or omissions of material facts, do not amount to a fraud unless done with fraudulent intent. Fraudulent intent is lacking where the falsity of the alleged representations were not shown to be capable of affecting the allegedly defrauded party's understanding of the bargain nor of influencing his assessment of the value of the bargain to him. Where the false representations are directed to the quality, adequacy or price of the goods themselves, the fraudulent intent is apparent because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain.

Additionally, however misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in

good faith. An honest belief in the truth of the representations made by a defendant is a complete defense, however inaccurate the statements may turn out to be. A defendant, however, has no burden to establish a defense of good faith.

C. **Third Element – Use of the Wires**

The third element of wire fraud is the use of an interstate or international wire communication in furtherance of the scheme to defraud. The wire communication must pass between two or more states, or it must pass between the United States and a foreign country. A wire communication includes a wire transfer of funds between banks in different states, telephone calls, emails and facsimiles between two different states.

The item sent through the wires need not itself contain a fraudulent representation. However, it must further or assist in the carrying out of the scheme to defraud. It is not necessary for the defendant to be directly or personally involved in the wire communication, as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

As I mentioned, the government need not prove that Mr. Greebel actually committed wire fraud, the unlawful act charged

as the object of the conspiracy in Count One. Rather, I remind you that what the government must prove each one of the following elements beyond a reasonable doubt:

First, that two or more persons entered into an agreement to commit wire fraud; and

Second, that Mr. Greebel knowingly and intentionally became a member of the conspiracy.

In addition, as I described earlier, the government must prove that venue is proper by a preponderance of the evidence.

3. Testimony of Dr. Rosenfeld

You have heard the testimony of Dr. Steven Rosenfeld, who entered into a Consulting Agreement and Release with Retrophin. The government does not allege in connection with Count One that Dr. Rosenfeld's Consulting Agreement and Release defrauded Retrophin.

You have also heard testimony concerning an arbitration involving Dr. Rosenfeld and Retrophin, and a copy of that arbitration decision has been admitted into evidence. The arbitration decision was introduced not for the truth of any statement in it, but rather as evidence of what transpired in relation to the rights and obligations of the parties to that

arbitration. The arbitration decision does not bind you in any way. As I have previously stated, you, the jury, are solely responsible for finding the facts in this case, based solely on the evidence at this trial.

4. Evidence Concerning Certain Transfers

You have heard evidence concerning the transfer of Retrophin shares to MSMB Capital and others in late 2012, as well as the dates of the transfers. The government does not allege that these share transfers defrauded Retrophin, and you cannot find Mr. Greebel guilty of Count One solely on the basis of evidence about these transfers and the dates these transfers occurred. Your consideration of the conspiracy charged in Count One is limited to whether the government has proven, beyond a reasonable doubt, that Mr. Greebel conspired with others to defraud Retrophin by causing it to enter into 1) allegedly fraudulent settlement agreements with investors in MSMB Capital and MSMB Healthcare, and 2) allegedly sham consulting agreements with one MSMB Capital investor and one MSMB Healthcare investor.

5. GAAP Standards

The government has offered evidence regarding generally accepted accounting principles, or GAAP. GAAP are standards used by accountants to prepare financial statements. I

instruct you that a violation of GAAP is not an element of a conspiracy to commit wire fraud or securities fraud.

COUNT TWO: Conspiracy to Commit Securities Fraud

Count Two of the Superseding Indictment charges Mr. Greebel with conspiracy to commit securities fraud in connection with Retrophin as follows:

> In or about and between November 2012 and September 2014, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EVAN GREEBEL, together with others, did knowingly and willfully conspire to use and employ manipulative and deceptive devices and contrivances, contrary to Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which would and did operate as a fraud and deceit upon investors and potential investors in Retrophin, in connection with the purchase and sale of securities of Retrophin, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, contrary to Title 15, United States Code, Sections 78j(b) and 78ff.
>
> In furtherance of the conspiracy and to effect its objects, within the Eastern District of New York and elsewhere, the defendant EVAN GREEBEL, together with others, committed and caused to be committed, among others, the following overt acts:

a. On or about December 12, 2012, Evan Greebel sent an email to [Marek Biestek], attaching six stock purchase agreements, and stated, in part, "attached are purchase agreements for the acquisition of the [unrestricted] stock. . . . Please ask each person to sign the last page and return it to me."

b. On or about December 13, 2012, Evan Greebel sent an email to [Marek Biestek] and another one of the seven employees and contractors who received unrestricted or free trading shares, and stated, in part, "Please send me an email confirming the following: I represent that I am not an officer, a director, or holder of 10% or more of the outstanding equity securities of Desert Gateway and do not, alone or together with any other person, exercise control over Desert Gateway."

c. On or about December 17, 2012, Martin Shkreli sent an email to all employees, copying six of the seven employees and contractors who received unrestricted and free trading shares, and stated that Retrophin now had four employees and that everyone else, including the employees and contractors who received the unrestricted or free trading shares, were no longer employees or consultants to Retrophin or MSMB even though they could continue using Retrophin's office space as a courtesy. Martin Shkreli then forwarded this email to Evan Greebel.

d. On or about December 20, 2012, Evan Greebel sent an email to Martin Shkreli, attaching a Schedule 13D, and stated, "Attached is a draft of the 13D. We should discuss."

e. On or about December 20, Martin Shkreli filed a Schedule 13D with the SEC that failed to disclose his control over any of the unrestricted or free trading shares.

f. On or about January 2, 2013, Martin Shkreli sent an email to Evan Greebel requesting Evan Greebel's thoughts on a draft email that Martin Shkreli wanted to send to one of the seven employees and consultants who received unrestricted or free trading shares and

who was selling his RTRX stock. In the draft email, Martin Shkreli stated, in part, "I have decided to commence litigation against you for failing to honor the agreement we made in our office on December 10th. You agreed to work for MSMB . . . Instead you have failed to come to the office and will not even return my telephone calls." Less than thirty minutes later, Evan Greebel replied to Martin Shkreli, and stated, "Very risky given what you[r] agreement was – could be opening a much bigger can of worms."

g. On or about January 18, 2013, GREEBEL sent an email to Martin Shkreli, and stated, in part, "I just need the [$100,000] and can be patient again; ive [sic] gotten you out of paying a lot of people, I cant [sic] be left stuck at this point on this." Later that day, GREEBEL sent another email, and stated, in part, "[I've] repeadtedy [sic] done all you ask and very rarely chase you for money."

h. On or about February 19, 2013, Martin Shkreli filed an amended Schedule 13D with the SEC that failed to disclose his control over any of the unrestricted or free trading shares.

i. On or about March 8, 2013, Evan Greebel sent an email to Martin Shkreli, and stated, "[Michael Fearnow] and the 'purchasers' are signing an amendment to their purchase agreement and in the amendment the 'purchaser' is directing [Michael Fearnow] to have the stock delivered to the designated people."

j. On or about April 10, 2013, Evan Greebel sent an email to [Michael Fearnow] and Martin Shkreli, and stated, in part, "The 50k [unrestricted or free trading] shares that were owed to [Marek Biestek] should be broken down as follows . . . ."

k. On or about May 9, 2013, in response to an email from Evan Greebel requesting the source of unrestricted or free trading shares to settle a dispute with a defrauded MSMB Healthcare investor, Martin Shkreli stated, "Take from anyone – I don't care – do the math?"

> 1. On or about January 15, 2014, GREEBEL sent an email to Martin Shkreli concerning a request by Investor 1 for, inter alia, 100,000 unrestricted or free trading shares and stated, in part, "As you may recall, we discussed that [Marek Biestek] could transfer 100k shares of stock to [Darren Blanton] and we could have the board approve a 100k grant of new RTRX stock to [Marek Biestek]." In response, Martin Shkreli stated, in part, "Smarter thing to do is to give him 200K restricted stock and have him swap any and all he wants for free trading from our employees."
>
> The defendant denies the charge.

1. Conspiracy

I have already instructed you on conspiracy as it relates to Count One, conspiracy to commit wire fraud. (See page 33.) The same instructions regarding conspiracy apply to Count Two, which charges a conspiracy to commit securities fraud. As I have previously instructed you, a conspiracy requires that the government prove, beyond a reasonable doubt:

First, that two or more persons entered into an agreement to commit a crime, which in this count is securities fraud; and

Second, that the defendant, Mr. Greebel, knowingly and intentionally became a member of the conspiracy.

There are, however, two additional elements the government must prove in order for you to find Mr. Greebel guilty of the securities fraud conspiracy charged in Count Two.

Specifically, the government must prove, beyond a reasonable doubt:

Third, that one of the members of the conspiracy committed at least one of the overt acts charged in the Superseding Indictment. In order for the government to satisfy this element, it is not required that all of the overt acts alleged in the Superseding Indictment be proven or that the overt act was committed at precisely the time alleged in the Superseding Indictment. It is sufficient if you are convinced beyond a reasonable doubt that the overt act occurred at or about the time and place stated. Similarly, you need not find that Mr. Greebel himself committed the overt act. It is sufficient for the government to show that one of the conspirators knowingly committed an overt act in furtherance of the conspiracy, since, in the eyes of the law, such an act becomes the act of all of the members of the conspiracy.

And Fourth, the government must prove beyond a reasonable doubt that at least one overt act was in furtherance of some object or purpose of the conspiracy as charged in the Superseding Indictment. In order for the government to satisfy this element, it must prove, beyond a

reasonable doubt, that at least one overt act was knowingly and willfully done, by at least one conspirator, in furtherance of some object or purpose of the conspiracy as charged in the Superseding Indictment. In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. Therefore, you are instructed that the overt act does not have to be an act which, in and of itself, is criminal or constitutes an objective of the conspiracy.

As with conspiracy to commit wire fraud, a defendant may be found guilty of conspiracy to commit securities fraud even if he was incapable of committing the underlying substantive crime of securities fraud. Consequently, for a defendant to be guilty of conspiracy, there is no need for the government to prove that he or any other conspirator actually succeeded in their criminal goals or even that they could have succeeded. However, the government must prove beyond a reasonable doubt that Mr. Greebel conspired with at least one

other person with the intent of committing each element of securities fraud.

****

In addition to these four elements, the government must also prove venue by a preponderance of the evidence. I have already instructed you about venue with regard to Count One (see p. 43), and those instructions apply here as well. Again, I caution you that the preponderance of the evidence standard applies only to establishing that venue. The government must prove each of the elements beyond a reasonable doubt.

2. Securities Fraud

The criminal object of the conspiracy charged in Count Two is Securities Fraud. I will now instruct you on the law regarding the underlying crime of securities fraud. The relevant statute is Section 10(b) of the Securities Exchange Act of 1934. That law provides in relevant part that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange –
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission ("SEC")] may prescribe as necessary or appropriate in

> the public interest or for the protection of investors.
>
> Based on its authority under this statute, the SEC enacted Rule 10b-5, which provides:
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

In order for you to convict Mr. Greebel of conspiracy to commit securities fraud charged in Count Two, the government must prove, beyond a reasonable doubt, that Mr. Greebel conspired to commit each element of securities fraud, which I will now describe.

1. First Element - Fraudulent Act

The first element of securities fraud is a fraudulent act. Thus, for purposes of the conspiracy to commit securities fraud charged in Count Two, the government must prove beyond a reasonable doubt that, in connection with the purchase or sale

of a security in Retrophin, Mr. Greebel conspired with at least one other person to:

(1) employ a device, scheme or artifice to defraud, or

(2) made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) engage in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon any person in connection with the purchase or sale of Retrophin securities.

Let me now explain some of these terms.

- *Device, Scheme, or Artifice to Defraud*: For the purposes of securities fraud, a device, scheme or artifice to defraud is a plan for the accomplishment of a fraud. Fraud is a general term that embraces all efforts and means that individuals devise to take advantage of others. The fraudulent or deceitful conduct alleged need not relate to the investment value of the securities involved in this case. Manipulative conduct that is designed to deceive or defraud investors by controlling or artificially affecting the price of securities is prohibited. An essential element

of manipulation of securities is the deception of investors into believing that the prices at which they purchase and sell securities are determined by the natural interplay of supply and demand.

- *False Statements and Omissions*: A statement, representation, claim, or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A representation or statement is fraudulent if it was made with the intention to deceive. False or fraudulent statements under the statute may include the concealment or omission of material facts in a manner that makes what is said or represented deliberately misleading. For a statement to be false because it conceals or omits material information, there must be a duty to disclose such information. As I have previously instructed you, this duty may arise because a defendant has made partial or ambiguous statements that require further disclosure in order to avoid being misleading.

- *"In Connection With"*: The "in connection with" aspect of this element is satisfied if there is some nexus or relation between allegedly fraudulent conduct and the sale

or purchase of securities. Fraudulent conduct may be "in connection with" the purchase or sale of securities if the alleged fraudulent conduct "touched upon" a securities transaction.

It is no defense to an overall scheme to defraud that Mr. Greebel may not have been involved in the scheme from its inception or may have played only a minor role with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that Mr. Greebel was the actual seller or offeror of the securities. For the purposes of the "in connection with" requirement, it is sufficient if you find that the government has proven, beyond a reasonable doubt, that Mr. Greebel conspired to engage in a fraudulent scheme that involved the purchase or sale of Retrophin securities. By the same token, the government need not prove that Mr. Greebel personally made an alleged misrepresentation or that he personally omitted a material fact necessary to make the statements made not misleading. It is sufficient if the government proves beyond a reasonable doubt that Mr. Greebel conspired with at least one other person to cause the statement to be made, or the fact to be omitted. With

regard to the alleged misrepresentations and omissions, you must determine whether the statement was true or false when it was made, and, in the case of alleged omissions, whether the omission was misleading.

- *Material Fact*: If you find that the government has established beyond a reasonable doubt that Mr. Greebel conspired to make a false statement, or omitted to state or disclose a fact in connection with the purchase or sale of any securities, you must next determine whether the fact misstated or omitted was material under the circumstances and that there was a duty to disclose the omitted information. "A misrepresentation is material under Section 10(b) of the Securities Exchange Act and Rule 10b-5 where there is a substantial likelihood that a reasonable investor would find the misrepresentation important in making an investment decision." If you find that Mr. Greebel conspired to make a material misrepresentation or to omit a material fact when there was a duty to disclose, it does not matter whether the intended victims were gullible buyers or sophisticated investors, because the securities laws protect the gullible and unsophisticated as well as the experienced investor.

Nor does it matter whether or not the alleged unlawful conduct was successful, or whether or not Mr. Greebel profited or received any benefits as a result of the alleged conspiracy. Success is not an element of the crime charged.

2. Second Element - Knowledge, Intent and Willfulness

The second element of securities fraud is that a defendant acted knowingly, willfully, and with intent to defraud. Where, as in this case, a defendant is charged with conspiracy to commit securities fraud, the government must prove, beyond a reasonable doubt, that the defendant conspired knowingly, willfully, and with intent to defraud.

I have already defined "knowingly" and "willfully" for you, and I refer you to those earlier definitions (see pp. 33-34).

The definition of an "intent to defraud" in the context of the securities laws is slightly different than the requirement for intent for wire fraud. For the purposes of securities fraud and the conspiracy to commit securities fraud charged in Count Two, "intent to defraud" means to act knowingly and with intent to deceive.

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that, as of a given time in the past, he committed an act with fraudulent intent. Such direct proof is not required.

Under the anti-fraud statutes, even false representations or omissions of material facts do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a complete defense, however inaccurate the statements may turn out to be.

3. Third Element - Instrumentality of Interstate Commerce

The third and final element of securities fraud is the use of the mails or any means or instrumentalities of transportation or communication in interstate commerce in furtherance of the scheme to defraud. This would include the

use of a telephone, a bank wire transfer or an email sent over the Internet that traveled across state lines.

It is not necessary that Mr. Greebel be directly or personally involved in any mailing, wire, or use of an instrumentality of interstate commerce. The government must, however, prove beyond a reasonable doubt that Mr. Greebel conspired to engage in conduct which he knew or reasonably could foresee would naturally and probably result in the use of interstate means of communication.

When one does an act with the knowledge that the use of interstate means of communication will follow in the ordinary course of business, or where such use reasonably can be foreseen, even though not actually intended, then he causes such means to be used.

It is not necessary that the items sent through interstate means of communication contain the fraudulent material, or anything criminal or objectionable. The interstate means of communication may be entirely innocent.

The use of interstate communications need not be central to the execution of the scheme, and may even be incidental to it. All that is required is that the use of the interstate communications bear some relation to the object of

the scheme or fraudulent conduct. In fact, the actual offer or sale need not be accomplished by the use of interstate communications, so long as the defendant is still engaged in actions that are a part of the fraudulent scheme when interstate communications are used.

* * * * *

In sum, to find Mr. Greebel guilty of conspiracy to commit securities fraud as charged in Count Two, you must find that the government has proven, beyond a reasonable doubt, the following:

First, that two or more persons entered into an agreement to commit securities fraud;

Second, that the defendant knowingly and intentionally became a member of the conspiracy;

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the Superseding Indictment; and

Fourth, that the overt act or acts that you find were committed were done specifically to further some objective of the securities fraud conspiracy.

In addition, you must find that the government has established that venue for Count Two is proper by a preponderance of the evidence.

3. Conscious Avoidance

As I explained, for purposes of both Counts One and Two, the Government is required to prove that the defendant knowingly and intentionally became a member of the conspiracy and that the object of the conspiracy was to commit wire fraud for Count One and securities fraud for Count Two. In determining whether the defendant acted knowingly with respect to the object of the conspiracy, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him.

If you find beyond a reasonable doubt that the defendant was aware that there was a high probability that his co-conspirators' objective was to violate the law as charged in the Superseding Indictment but that the defendant deliberately avoided confirming this fact, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge of the object of the charged conspiracy. However, if you find that the defendant actually believed that he or his co-conspirators were acting in a lawful manner, he may not be

convicted of the charge. I also remind you that guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken. There is a difference between intentionally participating in the conspiracy and knowing the objects of the conspiracy. "Conscious avoidance" of, or "willful blindness" to, the objects of the conspiracy, as I have described it, cannot be used as a basis for finding that the defendant intentionally joined the conspiracy. It is logically impossible for a defendant to join the conspiracy unless he or she knows the fact that the conspiracy exists.

However, if you find beyond a reasonable doubt that the defendant chose to participate in a joint undertaking, you may consider whether the defendant deliberately avoided confirming an otherwise obvious fact: that the purpose of the partnership he joined was to violate the law as charged in the Superseding Indictment.

4. Definition of "Affiliate"

An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer. Being an employee of an issuer alone does not make someone an

affiliate. Affiliates of an issuer include, but are not limited to, officers, directors, and controlling shareholders in that issuer. "Control" means the power to direct the management and policies of the company in question, whether through the ownership of voting securities, by contract, or otherwise.

III. Defenses

1. Good Faith

Good faith is a complete defense to the charges in this case. If you conclude that Mr. Greebel believed, in good faith, that he was acting properly, even if he was mistaken in that belief, and even if others were injured by his conduct, there would be no crime. Similarly, if you believe that Mr. Greebel believed in the truth of the representations that he made, then it does not make any difference if the representations were untrue. The burden of establishing lack of good faith and criminal intent rests on the government. A defendant is under no burden to prove his good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt.

IV. CLOSING INSTRUCTIONS

I have now outlined for you the rules of law applicable to the charges in this case and the processes by

which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations.

1. Selection of a Foreperson

When you retire, you will choose one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court. In order for your deliberations to proceed in an orderly fashion, you must have a foreperson, but of course, his or her opinion or vote are not entitled to any greater weight than that of any other juror.

2. Verdict & Deliberations

The government, to prevail, must prove the essential elements by the required degree of proof, as already explained in these instructions. If the government succeeds, your verdict should be guilty as to the count; if it fails, your verdict should be not guilty as to the count. To report a verdict, it must be unanimous.

Your function is to weigh the evidence in the case and determine whether or not the defendant is guilty, based solely upon such evidence.

Each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation — to discuss and consider the evidence; to listen to the views of fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and wholly on the evidence — if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself, after consideration, with your fellow jurors, of the evidence in the case.

But you should not hesitate to change an opinion that, after discussion with your fellow jurors, appears erroneous. However, if, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered.

Your final vote must reflect your conscientious conviction as to how the issues should be decided. Your verdict, whether guilty or not guilty, must be unanimous.

As you deliberate, your function is to weigh the evidence in the case and to determine whether the defendant is

guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon the defendant, if he is convicted, to influence your verdict, or in any way enter into your deliberations. The duty of imposing punishment rests exclusively with the court.

In addition, during your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blog, or website such as Facebook, MySpace, Instagram, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case, except with your fellow jurors in the jury room during deliberations.

Along the same lines, you should not try to access any information about the case or do research on any issue that arose during the trial from any outside source, including

dictionaries, reference books, or anything on the Internet. Information that you may find on the Internet or in a printed reference might be incorrect or incomplete. In our court system, it is important that you not be influenced by anyone or anything outside this courtroom. Your sworn duty is to decide this case solely and wholly on the evidence that was presented to you in this courtroom.

3. Note-Taking

Your notes are to be used solely to assist you and are not to substitute for your recollection of the evidence in the case. Do not assume simply because something appears in a juror's notes that it necessarily took place in court. Instead, it is your collective memory that must control as you deliberate upon the verdict. The fact that a particular juror has taken notes entitles that juror's views to no greater weight than those of any other juror, and your notes are not to be shown to any other juror during your deliberations.

4. Communications with the Court

If it becomes necessary during your deliberations to communicate with me for any reason, simply send me a note signed by your foreperson or by one or more other members of the jury. No member of the jury should ever attempt to communicate with me

or with any court personnel by any means other than a signed writing. I will not communicate with any member of the jury on any subject touching on the merits of this case other than in writing or orally here in open court. Do not ever disclose how the jury stands numerically or otherwise on the question of guilt or innocence.

5. Right to See Evidence

You will have the exhibits and a list of exhibits received in evidence during the course of the trial in the jury room with you. If you wish to have any portion of the testimony repeated, you may simply indicate that in a note. Be as specific as you can be if you make such a request. Let us know which exhibit or which part of which witness's testimony you want to hear, and please be patient while we locate it. If you need further instructions on any point of law, you should also indicate that in a note.

6. Return of Verdict

When you have reached a verdict, simply send me a note signed by your foreperson that you have reached a verdict. Do not indicate in the note what the verdict is.

To report a verdict, it must be unanimous. That is, all of you must agree that the government has proven beyond a

reasonable doubt that Mr. Greebel knowingly, willfully, and with intent to defraud, entered into an agreement with at least one other person to commit every element of wire fraud in Count One, or every element of securities fraud for Count Two.

You must render a verdict for the defendant as to both Count One and Two of the Superseding Indictment. To help you, I have prepared a verdict form that may be of assistance to you in your deliberations. On the verdict sheet are spaces marked "guilty" or "not guilty" for both counts. The form is in no way intended to indicate how you must deliberate or decide the facts of this case. The foreperson should use a check mark in the appropriate space indicating "guilty" or "not guilty" for each count of the Superseding Indictment with which Mr. Greebel is charged. The foreperson should also place his or her initials and the date beside each mark on the verdict form.

7. Conclusion

Finally, I want to remind you of the oath you took when you were sworn as a juror at the beginning of this case. Remember, in your deliberations, that this case is no passing matter for the government or Mr. Greebel. The parties and the court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so

doing, you carry out to the fullest your oaths as jurors: to well and truly try the issues of this case and a true verdict render.

Before asking you to retire and begin your deliberations, let me first consult with counsel to be certain I have not overlooked any point.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for

the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(Added July 16, 1952, ch. 879, §18(a), 66 Stat. 722; amended July 11, 1956, ch. 561, 70 Stat. 523; Pub. L. 101–73, title IX, §961(j), Aug. 9, 1989, 103 Stat. 500; Pub. L. 101–647, title XXV, §2504(i), Nov. 29, 1990, 104 Stat. 4861; Pub. L. 103–322, title XXXIII, §330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub. L. 107–204, title IX, §903(b), July 30, 2002, 116 Stat. 805; Pub. L. 110–179, §3, Jan. 7, 2008, 121 Stat. 2557.)

AMENDMENTS

2008—Pub. L. 110–179 inserted "occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or" after "If the violation".

2002—Pub. L. 107–204 substituted "20 years" for "five years".

1994—Pub. L. 103–322 substituted "fined under this title" for "fined not more than $1,000".

1990—Pub. L. 101–647 substituted "30" for "20" before "years".

1989—Pub. L. 101–73 inserted at end "If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both."

1956—Act July 11, 1956, substituted "transmitted by means of wire, radio, or television communication in interstate or foreign commerce" for "transmitted by means of interstate wire, radio, or television communication".

§ 1348. Securities and commodities fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)); or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d));

shall be fined under this title, or imprisoned not more than 25 years, or both.

(Added Pub. L. 107–204, title VIII, §807(a), July 30, 2002, 116 Stat. 804; amended Pub. L. 111–21, §2(e)(1), May 20, 2009, 123 Stat. 1618.)

AMENDMENTS

2009—Pub. L. 111–21, §2(e)(1)(A), inserted "and commodities" before "fraud" in section catchline.

Pars. (1), (2). Pub. L. 111–21, §2(e)(1)(B), (C), inserted "any commodity for future delivery, or any option on a commodity for future delivery, or" before "any security".

§ 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]